Supreme Court of the United States

697

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

TABLE OF CONTENTS OF PETITION

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	3
Provisions of the Constitution, Statutes, Postal Regulations and Postal Conventions Involved	4
Statement of the Case	5
Holding of the Court Below	10
Erroneous Findings and Conclusions	12
(1) Empty sacks and empty air mail sacks in claim were carried on same trip as the mails	12
(2) Requirement that mails be picked up at the Post Office and trucked to piers	14
(3) The Brussels Convention of 1952	15
Reasons for Requesting Writ of Certiorari	16
1. The term "mail" includes sack containers and empty sacks	17
2. Suits are for compensation based upon the weights of mails including the sacks	18
3. Steamship carriers should not be required to become unwilling partners in generosity between Postal Administrations	19
4. The Requirement to carry without compensation constitutes a taking within the prohibition of the Fifth Amendment	21
Conclusion	21

TABLE OF CONTENTS OF APPENDIX

Page

Court of Claims Opinion on Plaintiff's Motion to Strike Defendant's Third and Fourth Special Defenses 1a-5a

Report of Trial Commissioner of Findings of Fact 6a-25a

Court of Claims Opinion, Findings of Fact and Conclusion of Law 26a-56a

Proceedings Following Opinion of the Court 56a

Relevant Postal Laws and Regulations 1948, in effect on and after October 1, 1950

Sec. 120.7(a)(b)(c) 57a-58a

Sec. 120.7(b) as amended effective August 1, 1954 ..... 58a-59a

Sec. 125.2, mails must be carried by foreign vessels (first paragraph) 18 U.S.C. 1724 ..... 59a-60a

Sec. 125.3 Duty of all vessels to carry mails (second paragraph) 18 U.S.C. 1724 ..... 60a

Sec. 125.5a (as amended effective August 1, 1954) transportation of outgoing mails from post offices to ships 60a-61a

Sec. 125.5 (39 U.S.C. § 655) Fines on carriers 61a

Provisions of Universal Postal Conventions:

Paris 1947

Art. 67, Transit charges on correspondence 62a

Art. 35, definition of "articles of Correspondence" (footnote) 62a

Art. 68, exemptions from transit charges 63a

Brussels 1952

Art. 78, Transit charges on correspondence borne by Administration of country of origin of dispatch 64a

Page

Art. 78, par. 2, third services defined 64a

Art. 78, par. 4, maritime transit begins when dispatches are placed under hoist 64a

Art. 79, Exemption from transit charges 65a

Paris 1947

Art. 153, pars. 1, 2, 6 and 7—statistical period—conduct of 65a

Art. 154, pars. 1 and 2, Fixing number of sacks and weights of closed mails 66a

Art. 161, pars. 1, 4, and 5—Transit charge account 66a

Brussels 1952

Note: Articles 171, 172 and 179 contain provisions similar to those in Articles 153, 154 and 161 of the Paris 1947 Convention 67a

TABLE OF CASES

New York Central R.R. Co. v. United States, 65 Ct. Cls. 115, affirmed 279 U.S. 73 21

Pacific Mail Steamship Co. v. United States, 28 Ct. Cls. 1 21

United Fruit Co. v. United States, 144 Ct. Cls. 154 (1958) 1, 18, 21

United Fruit Co. v. United States, 103 Ct. Cls. 303 (1945) 21

United Fruit Co. v. United States, 112 Ct. Cls. 519 (1949) 21

STATUTES, POSTAL REGULATIONS AND POSTAL CONVENTIONS

Postal Laws and Regulations 1948:

39 U.S.C. § 654(a); Section 120.7(a), (App. p. 56a) .. 3
Section 120.7(b) (c) (App. pp. 57a-58a) 2, 3, 4, 9, 10, 11, 13, 14

18 U.S.C. § 1724, Sections 125.2, 125.3 (App. p. 60) 3, 4, 5, 7, 8, 11

Section 125.5a (App. p. 61a) 4

Page

UNIVERSAL POSTAL UNION CONVENTIONS:

Paris, 1947

Article 67, paragraphs 1 and 2 (App. p. 62a) 3, 5
Article 68 (App. p. 63a) 3, 5
Article 153, paragraphs 1, 2 and 7 (App. p. 65a) 3, 5, 13, 19
Article 154, paragraphs 1 and 2 (App. p. 66a) 3, 5
Article 161, paragraphs 1, 4 and 5 (App. p. 66a) 3, 5, 13, 19

Brussels

Articles 78, 79 (App. p. 64a) 4, 5, 9, 15
Article 171 (Footnote, App. p. 68a) 5
Article 172 (Footnote, App. p. 68a) 5
Article 179, paragraph 5 (Footnote, App. p. 68a) 4, 5, 15

Rome, 1906

Article 4, paragraph 3 (Footnote) 6

Act of February 14, 1929 (39 U.S.C. § 654(a), amending R.S. 4009 ..... 6, 16, 19, 20
5 U.S.C. § 372 19
Merchant Marine Act 1936, U.S.C. § 1171 5

DOCUMENTS

Documents du Congres D'Bruxelles 1952, Tome 1, pp. 533-534, (Post Office Department Library) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

UNITED FRUIT COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Petitioner, United Fruit Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered on April 7, 1961. Plaintiff's motion for a rehearing was overruled by order of the Court on October 4, 1961.

OPINION BELOW

The opinion of the Court by Judge Whitaker granting plaintiff's motion to strike defendant's third and fourth defenses to the jurisdiction of the Court of Claims is reported as *United Fruit Co.* v. *United States*, 144 Ct. Cls. 154. The opinion, findings of fact and judgment of the

court by Judge Laramore is not yet reported. Both opinions, the report of the Trial Commissioner, together with order of Court overruling petitioner's motion for rehearing on October 4, 1961, are set forth in the Appendix hereto.

JURISDICTION

Two suits were instituted by petitioner under the Tucker Act in the Court of Claims; the first (Docket No. 46-56) seeks recovery of the balance of compensation allegedly due for weights of sacks containing mails and for empty sacks transported by steamships during the period from October 1, 1950, to July 31, 1954, at the rates per pound fixed in Section 120.7(3)(b) Postal Laws and Regulations, 1948; the second suit (Docket No. 568-57) seeks recovery of the balance of compensation for sacks enclosing mails and for empty sacks tendered during the period on and after August 1, 1954, at rates per pound applied to the net weights of mails in amended Section 120.7(b), and for reimbursement of expenses for trucking of mails from post offices to steamship piers from and after August 1, 1954. The two suits were consolidated for hearing and a single opinion rendered on the consolidated cases. The court denied recovery on all of petitioner's claims except that judgment was allowed petitioner for empty air mail sacks enclosed in bundles of other empty sacks, the amount to be determined pursuant to Rule 38(c).[1] Review is not sought of this part of the judgment relating to empty air mail sacks.

Jurisdiction of this court to review the decision of the Court of Claims is invoked under 28 U.S.C. 1255(1).

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[1] The amount cannot be ascertained until completion of tests as to average weight and number of air mail sacks contained in bundles of other empty sacks and deducting average weights thereof from the total weights of empty sacks represented in plaintiff's claim.

QUESTIONS PRESENTED

1. Do the provisions of the Universal Postal Union Convention of Paris, 1947, Article 153, paragraph 7, authorize the Postmaster General to require the gratuitous carriage of empty mail sacks pursuant to his powers under 18 U.S.C. 1724, after protest and notice that compensation for empty sacks tendered by the Postmaster General would be demanded at the rates fixed in Section 120.7(3)(b) for other articles.[2]

2. Do the provisions of Article 161, paragraph 5, of the Convention of Paris, 1947, authorize deduction of weights of sacks enclosing mails in calculating compensation at rates in Section 120.7(3)(b) Postal Laws and Regulations 1948, for steamship transportation required pursuant to 18 U.S.C. 1724 after protest and notice that mails would be accepted and transported on condition that compensation be calculated and paid on a gross weight basis at those rates.

3. Does the term "sea transit rates" for steamship transportation, as used in the Act of February 14, 1929 [39 U.S.C. 654(a)] as the basis of compensation in case of a foreign vessel, relate (1) to the rates for maritime transit per kilogram set forth in Article 67 of the Universal Postal Union Convention of Paris, 1947, and

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[2] The provision in the Convention reads as follows:

> Insofar as it concerns sacks which contain only empty sacks or correspondence exempt from all transit charges (Article 79 of the Convention), the notation *Statistique* (Statistics) is followed by the word *Exempt*.

Witness Greever-Allan testifying on direct (Tr. pp. 370-371) for the Post Office Department said:

> Well, with regard to the return of empty equipment, the Convention states that empty bags are exempt from statistics. And from that one little phrase for many, many years the bags have been returned *gratuitously* (Emphasis added).

in Article 78 of the Brussels Convention 1952, or (2) does the term refer to "transit charges" or "maritime transit" in the settlement of accounts between Postal Administrations pursuant to the provisions of Article 153, paragraph 7, and Article 161, paragraph 5, of the Paris Convention and Article 179, paragraph 5, of the Brussels Convention 1952.

4. May the Postmaster General lawfully require the cartage of mails from the post office to piers and onward steamship transportation pursuant to 18 U.S.C. 1724 at rates of compensation fixed by amended Section 120.7(b)(c) effective August 1, 1954, for the net weights of mails, after petitioner's protest and notice that mails tendered on and after August 1, 1954, would be accepted and transported on condition that compensation be calculated on gross weights and that petitioner be reimbursed its expenses for cartage of mails from post offices to piers as required by amended Section 125.5a Postal Laws and Regulations.

PROVISIONS OF THE CONSTITUTION, STATUTES, POSTAL REGULATIONS AND POSTAL CONVENTIONS INVOLVED

The Fifth Amendment to the Constitution "nor shall private property be taken for public use, without just compensation."

References to relevant provisions of the Postal Laws and Regulations and Articles of the Universal Postal Union Conventions, printed in the Appendix hereto, pp. 56a to 68a, are as follows:

Postal Laws and Regulations, 1948, section 120.7(a), 39 U.S.C. 654(a) (p. 57a); section 120.7(b)(c) (pp. 57a-58a); 120.7(b) as amended August 1, 1954 (pp. 59a-60a); section 125.2 (p. 60a); section 125.52 (p. 61a); section 125.5(a), 39 U.S.C. 655; section 125.5(b) (pp. 61a-62a).

Provisions of Universal Postal Union Conventions:

Paris 1947 Art. 67, paragraphs 1 and 2 (p. 63a), Art. 68 (p. 64a);

Brussels 1952, Art. 78, paragraphs 1, 2 and 4 (p. 65a), Art. 79 (p. 66a);

Paris 1947, Art. 153, paragraphs 1, 2, 6 and 7 (p. 66a), Art. 154, paragraphs 1 and 2 (p. 67a); Art. 161, paragraphs 1, 4 and 5 (p. 67a);

Brussels 1952, Note. Articles 171, 172, and 179 contain substantially same provisions as Articles 153, 154 and 161 of Paris Convention (pp. 66a-67a).

STATEMENT OF THE CASE

Petitioner is a steamship owner and operator of a steamship line in foreign commerce between New York or New Orleans, on the one hand, and various ports in Central and South America, the Panama Canal Zone, and islands in the Caribbean area, on the other. For years it has regularly transported passengers, cargo, and mail. Plaintiffs receives no operating differential subsidy under the Merchant Marine Act 1936, 46 U.S.C. § 1171.

There was a long existing practice of the Post Office Department of paying for the steamship transportation of mails to foreign ports on a net weight basis, no compensation being paid for weights of sacks or for empty sacks dispatched with the mails. Apparently, the practice arose under R.S. 4009, which provided that for transporting the mail between the United States and any foreign port the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship, any sum not exceeding the sea postage on the mail so transported. (Finding 28; App., p. 53a).

The Act of July 3, 1926, amended R.S. 4009 to provide that for transportation of mails on American flag vessels

the Postmaster General may allow "compensation not in excess of the amount of postage collected on the mail transported on such vessel," and in case of a foreign vessel not in excess of the "sea transit rates" prescribed by the Universal Postal Union Convention.[3] The Act of February 14, 1929 (39 U.S.C. 654(a)) entitled "An Act to provide more definitely the rates of compensation payable to steamships of United States registry for transportation of foreign mails," amended the Act of July 3, 1926,[4] so as to provide that the Postmaster General may allow to United States vessels compensation on a weight basis of not exceeding 80 cents a pound for letters and 8 cents a pound for other articles, including parcel post, and in case of a foreign vessel compensation not in excess of the "sea transit rates" prescribed from time to time by the Universal Postal Union Convention (Finding 28; App. p. 54a).

On June 16, 1950, petitioner by its vice president, sent a letter to the Assistant Postmaster General protesting against the refusal of the Department to allow any compensation for steamship transportation for the weight of empty sacks, and the refusal to include the weights of mail sacks in the weights of mails, and expressing the

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[3] The Convention of Rome 1906 (Art. 4, par. 3) was the first to prescribe charges for "sea transit." This was changed to "maritime transit" in the Convention of Stockholm 1924 and subsequent Conventions (Art. 70, par. 1).

[4] The language of the Act of February 14, 1929, follows substantially the draft recommended by the Postmaster (Annual Report Post Office Department, p. 87). House Report No. 1788 to accompany H.R. 6865 (the Act of February 14, 1929) states that Comptroller General holds that the rates per pound then being paid could not continue unless it was shown that the postage collected from the mails dispatched on each trip of a ship is not less than that the rates fixed. In order to avoid the great and useless amount of work involved in such an ascertainment, the Postmaster General recommended that the law be changed.

view that gross weights of all mails (including sack containers) and empty sacks tendered by U. S. postmasters for outbound transportation is an obligation of the Department and that compensation should be allowed and paid at the applicable rates. It was also stated that the exclusion of weights of sacks containing mail had no counterpart in any other system of transportion utilized by the Department (Finding 29; App. pp. 23a, 54a); that there was no precedent in commercial practice for exclusion of weights of sack containers (Finding 4, App. pp. 7a, 35a); and that the practice had become aggravated by returning empty air mail sacks. Notice was given that on and after October 1, 1950, that any mails tendered "will be accepted and transported by this company on the condition that compensation for the transportation . . . will be computed upon the gross weight (including sacks) of mails so tendered and transported"; also that empty sacks "will be accepted and transported with the distinct understanding that compensation will be claimed and demanded at the rates specified in the Postal Laws and Regulations for Other Articles." (Finding 19, App. pp. 44a-46a).

On July 14, 1950, the Acting Assistant Postmaster General replied to petitioner's letter, the pertinent portion being set forth in Finding 20 (App. pp. 16a-19a, 46a-48a), to the effect that pursuant to 18 U.S.C. 1724 plaintiff was required to transport mail tendered by the Postmaster General and upon refusal clearance of steamers shall be withheld upon notice thereof to the clearance officer of the port; that compensation for steamship transportation is paid on the net weight of mail involved; and that it is the universal practice not to pay for weight of sacks used in connection with the dispatch of regular or parcel post mails or for the return of empty sacks, either in transit through foreign countries or by steamers. It was stated that the practice is apparently based on provisions of the Universal Postal Union Convention, the

thien present one being that signed at Paris, July 5, 1947.[5] The Assistant Postmaster General agreed that some action should be taken towards possible payment for weights of sacks used in the dispatch of mails as well as for the return of empty sacks, but until something was done by the Universal Postal Union, it would be necessary for the United Fruit Company to accept any mails tendered by United States postal authorities in accordance with rules and regulations as set forth by the Postmaster General. (Finding 20; App. pp. 16a-19a, 46a-48a).

Petitioner replied September 29, 1950, that it recognized its obligation to transport the mails pursuant to 18 U.S.C. § 1724, but disavowed any obligation to transport sacks containing mails or empty sacks without compensation and persisted in earlier position. It was requested that postmasters be directed to furnish statement of weights of sacks at the time the net weight statements of mails are furnished. (Plaintiff's Ex. 4; Finding 21; App. pp. 21a, 49a).

On and after October 1, 1950, the Department continued to tender mails to petitioner. The United States postal authorities in the Canal Zone and Caribbean area began furnishing statements of the gross weights of mails dispatched on petitioner's vessels. Vouchers were filed for compensation on the basis of the gross weights furnished;

[5] The provisions of the Convention relied upon, which are quoted in the letter (Finding 20), relate to the settlement of accounts for territorial and maritime transit between Postal Administrations on the basis of statistics for 28 days every three years, which exclude from the statistics the weights of all official mail, prisoner of war mail, and free for the blind when enclosed in separate sacks, also sacks containing empty sacks, and in addition the debtor country is given a credit of 10 per cent on the franc amounts on all other sacks containing regular mails, in order to take account of the weights of sacks and packing as well as any exempt mails enclosed therein. See Articles 153, 154 and 161 of the Paris Convention in annexed Appendix, pp. 66a to 68a.

the Department revised the vouchers and made payment of the net weights of the mails. The furnishing of gross weight statements were stopped. (Findings 21 and 22; App. pp. 19a-20a, 49a). The tender of the mails continued and payments made only for net weights as theretofore. The matter of handling and possible payment for empty sacks and sacks enclosing the mails was to be considered after the Brussels Convention to be held in 1952 (Findings 23, 24; App. pp. 20a, 50a).

The Postal Regulations Section 120.7, pagagraphs (b) and (c) were amended effective August 1, 1954 (App. pp. 58a, 59a) abolishing the previous distinction in rates for letters and postcards and for other mails and establishing single rates in "cents pound-net weight" for all mails, on an ascending scale according to distances, varying slightly for certain short distance zones from the maritime transit rates in Art. 78 of the Brussels Convention, which were on a gross weight basis.

On July 23, 1954, petitioner sent a further letter to the Assistant Postmaster General, reiterating its previous protest of June 16, 1950, and in addition served notice that on and after August 1, 1954, petitioner would demand reimbursement for expenses in trucking mails from the post offices to the piers (Finding 26; App. p. 22a, as amended by Court, p. 51a). The demand for reimbursement for trucking the mails from post office to piers was based upon Article 78, paragraph 4, which defined maritime transit as beginning when the mails are placed under hoist and ends when discharged on the wharf. The Assistant Postmaster General acknowledged receipt of petitioner's letter of July 23, 1954, without any comment. (Plaintiff's Exhibits 8 and 9).[6]

[6] In its motion to the court for a rehearing, petitioner took exception to court's substitution for the Trial Commissioner's Finding 27 (App. p. 22a) an entirely new Finding 27 (App. pp. 51a-53a) based upon a letter from Assistant Postmaster General John C.

HOLDING OF THE COURT BELOW

The Court of Claims, on the basis of conclusions of fact which differ from certain material findings of fact by the Trial Commissioner, held –

(1) That the rates per pound fixed by Section 120.7(3)(b) of the Postal Regulations, 1948, covered the carriage of sacks, both ways, as well as the articles which they contained; that had there been any intention to pay additional compensation for the carriage of the sacks which enclosed the mails the regulations would have said so; and that the absence of a provision for additional payment would seem to show that none was to be paid.[7] (App. p. 29a).

Allen to the American Merchant Marine Institute "with respect to the applicability of the rates" on and after August 1, 1954. The letter in question is obviously self-serving in that it contains statements as to the coverage of the rates on empty sacks and the transportation of the mails from the post office to piers which are not a part of the regulation issued that day. The Court was urged to amend its Finding 27 by restoring the Trial Commissioner's Finding 27, also to include four letters in evidence bearing on the subject as follows:

(a) Letter of October 22, 1953, from the President of American Merchant Marine Institute to Assistant Postmaster General John C. Allen (Gov't. Ex. 14A),

(b) Letter of June 16, 1954, from AMMI to Assistant Postmaster John C. Allen (Gov't. Ex. 14B),

(c) Letter of June 30, 1954, from Assistant Postmaster General John C. Allen in reply (Gov't. Ex. 14B), and

(d) Letter of July 23, 1954, from petitioner to Assistant Postmaster General John C. Allen (Plaintiff's Ex. 8; Gov't. Ex. 14C).

[7] None of the rate regulations in effect up to December 31, 1953, discloses that the rates per pound was applicable to net weights, or that the rates excluded weights of sacks which contained them, or the weights of empty sacks, neither do the Post Office Waybills nor Statements of Weights of mail show any exclusions of weights, either before or after August 1, 1954. (Plaintiff's Exhibits 18, 60, 61, 62 and 63; also actual waybills and weight statements, Plaintiff's Exhibits 40, 41 and 42).

(2) That both parties knew that in order to carry the letters and postcards the steamship company had to bring the sacks back and the rate fixed for carrying the letters and postcards, not only covered carrying the sacks in which they were contained, but also covered "bringing back the empty sacks," (App. p. 29a) but that this did not apply to the empty air mail sacks. (App. p. 33a).

(3) That 18 U.S.C. § 1724 is authority for the amended Section 125.2(b) effective August 1, 1954, requiring steamship companies to come to the post office to pick up outgoing mail, and that the rates fixed by the Postmaster General Section 120.7(b)(c) were "intended" by him to cover compensation for this service, as well as transportation by sea; that the failure to provide for additional compensation indicates the rates fixed for carriage of letters, etc., included all services incidental thereto. (App. p. 32a).

(4) That the letter of July 14, 1950, from the Assistant Postmaster General (Finding 20) written prior to the period involved in the present suits, rejected plaintiff's protest and notice of June 16, 1950 (Finding 19; App. pp. 44a-46a) that mails tendered on and after October 1, 1950, would be accepted and transported on condition that compensation be calculated on a gross weight basis.*

(5) That the Postal Union Convention held in Brussels in 1952 refused to change the basis of payment of compensation, and continued to compute it on the net weight of the contents of the sacks.

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*Petitioner submits the letter of July 14, 1950, (Finding 20) did not relieve the Post Office Department of its legal liability to compensate on a gross weight basis on mails tendered on and after October 1, 1950, in view of the complete lack of acquiescence as demonstrated by repeated protests by petitioner and persistence in its original position. (See Findings 21, 22, 23, 24, 26, 30 and 31. App. pp. 19a-23a, 49a-51a, 54a-55a).

ERRONEOUS FINDINGS AND CONCLUSIONS

(1) Empty sacks and empty air mail sacks in claim were carried on same trip as the mails

The court's conclusions that the outbound rate applied to net weights of letters, etc., not only covered the carriage of the sacks which enclosed them, but also covered "bringing back the empty sacks," indicates confusion by the court as to the empty sacks actually involved in plaintiff's claims. (See Findings 14, 16, 17 and 18).

The use of Post Office Forms described in Findings 14 and 18 may be illustrated from Plaintiff's Exhibits 40, 41 and 42, *e.g.*, Post Office Waybill of Sacks Dispatched to Habana per SS METAPAN sailing from New York October 5, 1956, listed sacks under categories as follows:

RED LABEL (registered)	62 Sacks
L.C. and A.O. (Letters and All Others)	536 Sacks
PARCEL POST	164 Sacks
EMPTY SACKS (bundles of Empties)	22 Sacks
Total	784 Sacks

Received the Mail Advised on This Waybill Totaling 784 Sacks.

Date For Commander.....

The METAPAN also had a separate Post Office Waybill for mails dispatched on the same date from New York to Puerto Cortes (Honduras) showing a total of 223 sacks, but no bundles of Empty Sacks. Empty air mail sacks were enclosed in the 22 bundles of empty sacks destined to Havana, the number and weight not recorded. The weight statement (Findings 17 and 18) sent the steamship company by the postmaster several days after departure shows weights as follows:

Statement of weights of mails dispatched from New York, N.Y., as specified below by United Fruit Co. Vessel METAPAN Registry U.S., sailing October 5, 1956.

	United States Mails			Foreign Transit closed Mails		
Destination	Letters	Prints	Parcel Post	Letters grams	Prints grams	Closed Mails grams
Cuba		21,725	6,599	98,930	2,772,789	268,892
Honduras	159	3,111	3,178	26,328	939,234	341,617
Total Grams						
Total Pounds	159	24,836	9,777	276	8,185	1,346

Postmaster

The weights shown could not be identified with the sacks as listed on the Post Office waybills. (Finding 18; App. pp. 16a, 44a).

The court's conclusion that the *definite rates* named in Section 120.7(b) (App. p. 28a) for letters and postcards were "intended" by the Postmaster General to cover the sacks which contained them seems farfetched in view of the fact that the Acting Postmaster General in his letter of July 14, 1950 (Finding 20), stated that it was the practice not to pay for weights of sacks used in connection with the dispatch of regular or parcel post mails or for the return of empty sacks (to the foreign countries to which they belong); that the practice was based upon Article 153, paragraph 7, and Article 161, paragraph 5 of the Paris Convention governing the settling of accounts between Postal Administrations. If we understand the court's logic, the statement would seem to effectively dispose of any conclusion that the rates for letters covered the weight of the sacks containing mails and empty sacks. Certainly, the settlement of accounts between Postal Administrations which exclude the weights of sacks, cannot logically be construed as proof that the United States has paid the steamship companies utilized by it for all the mails tendered and carried, including the enclosing sacks and empty sacks.

The Postmaster General fixed a class rate for Letters and Postcards, and another class rate for Other Articles, including parcel post. Without more, logic leads to the conclusion that the rates were to be applied to the gross weights of the particular class of mails as tendered by the post office. The same reasoning would apply if the class rate was so much per cubic foot. The deduction of the cubic footage of sacks enclosing mails would be wholly unrealistic.

(2) Requirement that mails be picked up at the Post Office and trucked to piers

The court erroneously holds that the rates for steamship transportation were "intended" to cover compensation for picking up the mail at the Post Office and trucking to piers. As evidence to the contrary that such was the intention, the transcript of testimony of Witness Greever Allan (Tr. 442), an official of the Post Office Department and a member of the Technical Transit Committee, shows that the original draft proposing amendment of Section 120.7(b) of the Postal Regulations (Plaintiff's Ex. 66, marked for identification) fixing rates of payment of compensation for United States mails and foreign closed transit mails on American flag ships and ships of foreign registry, contained the following paragraph:

> The rates above include transportation by the steamship companies of the sacks of mail, including parcel post and sacks containing empty sacks, from the post office to the transporting vessel.

The amendment effective January 1, 1954, omitted the quoted paragraph; likewise, it was omitted from the further amendment effective August 1, 1954 (Plaintiff's Exhibit 18, pp. 12-16).

(3) The Brussels Convention of 1952

The Court erroneously eliminated in Finding 25 the Trial Commissioner's finding that the rates for territorial and maritime transit were applicable to gross weights of letters and other articles, not including parcel post, and defined maritime transit as beginning at the moment when the dispatches are put under hoist and ends when they have been unloaded at the wharf. (App. p. 25).

The Court erroneously substituted for the elimination its finding in Finding 25 (App. p. 51a) the following:

> . . . "the proposals that gross weights replace net weights as the basis of compensation for carriage of and the empty sacks be counted as mail were rejected by the member nations."

The Court is clearly confused as to what was rejected. The Convention adopted territorial and maritime charges on a "per gross kilogram" basis. (See Trial Commissioner's Finding 25, App. p. 21a, and Article 78, Appendix hereto, page 65a).

The record of the proceedings in the Brussels Congress shows the Congress rejected Proposition 279 to eliminate the 10 per cent reduction in the settlement of accounts between countries (not between the Post Office Department and the steamship carriers). Proposition 279 proposed to amend Article 179 of the Brussels Convention (which is the same as Art. 161, par. 5, of the Paris 1947) to read as follows (translation):

> 5. In order to remunerate the countries or third services for the transport in return of empty sacks, the transit charges accounts are not reduced to account for exempt correspondence in the sacks containing other categories of correspondence.

The reasons for Proposition 279 stated that (translation) "In the new section 5, it was considered advisable to

specify that the accounts of the transit charges should no longer be reduced by 10%, the suppression of this reduction constituting a certain remuneration to the countries or third services for the return of empty sacks in transit."

Proposition 280, also rejected, proposed that instead of reducing the account for closed mails by 10 per cent the amount be increased by 5 per cent, because some countries had expressed the opinion that to remunerate the transit of empty sacks, it was not sufficient to discontinue the 10 per cent reduction provided in section 5, but that in addition the accounts should be increased by 5 per cent. (Documents du Congres D'Bruxelles 1952, Tome I, pp. 533-534. Post Office Department Library).

REASONS FOR REQUESTING WRIT OF CERTIORARI

A writ of certiorari is requested for the reason that the Court of Claims had (1) decided an important question of federal law not heretofore decided by any court, in a way which is in conflict with legal principles in previously decided cases of the Court of Claims and by this Court; (2) the decision hinges on the interpretation of certain provisions of the Universal Postal Union Conventions not heretofore decided by any court; and (3) the decision is predicated on certain erroneous conclusions of fact which are contrary to the findings of fact by the Trial Commissioner.

The decision supports the survival of the ancient practice of the Post Office Department in calculating compensation for steamship transportation pursuant to R.S. 4009, instead of on the basis of the maritime transit rates (sea transit rates) authorized as a rate base for compensation for steamship transportation on foreign flag vessels by the Act of February 14, 1929 (39 U.S.C. 654(a)).

Under R.S. 4009 compensation was allowed at not exceeding the amount of postage on the mails carried, thus

excluding from compensation the weights of all mails exempt from postage and transit charges, such as official mail on international postal business, prisoner of war mail, free mail for the blind, as well as weights of sacks containing mails and empty sacks being dispatched by the Postmaster General to the country to which they belonged.

The logic back of the decision may be interpreted to mean that compensation measured by the basis of settlement of accounts between countries pursuant to Postal Conventions *could* be intended to cover the carriage by steamships, of mails exempt from postage, as well as the sacks enclosing the mails and the empty sacks, which was the basis of compensation under R.S. 4009.

1. The term "mail" includes sack containers and empty sacks

In the cases at bar the special defense raised by defendant involving jurisdiction of the Court of Claims over the subject matter of sacks enclosing the mails and empty sacks, the court by Judge Whitaker, in granting petitioner's motion to strike the special defense, said that—

> It has long been recognized that the mail includes not only the letters themselves, but also the containers. It was so held in *United States* v. *Marselis*, 26 Fed. Cases 1167; *United States* v. *Wilson*, 28 Fed. Cases 699, 711; *United States* v. *Inabet*, 41 Fed. 130. * * * Congress, in the passage of the Railway Mail Pay Act of 1916, 39 U.S.C. 529, 539, recognized that the sacks were a part of the mails when it authorized the Postmaster General to withdraw empty bags "from the mail" and transit them by freight or express, and later to return them "to the mails." * * * *United Fruit Co.* v. *United States*, (1958), 144 Ct. Cls. 154; copy annexed in Appendix, pp. 2a-3a.

2. Suits are for compensation based upon the weights of mails including the sacks

The court holds that compensation computed on the net weights "covered" the carriage of the sacks, both ways, as well as the articles which they contained; although "there was deducted the weight of the mail sacks from the weight of the sacks with the letters and packages contained therein." The court also holds that the rate covers "bringing back the empty sacks," and that plaintiff "seeks additional compensation based on weight including the sacks and for transportation of empty sacks."[9]

This is in conflict with the court's previous decision by Judge Whitaker in the jurisdictional challenge by defendant in the cases at bar. The defendant's fourth special defense was that the court had no jurisdiction because to render a judgment would require the court to fix rates for the carriage of sacks, the court said—

> "This is not true. What plaintiff asks us to do is to hold that the sacks were a part of the mails and that it is entitled to compensation based upon the weight of the mails including the sacks, and the weight of the empty sacks returned. The rates are fixed by the Postmaster General. The question presented to us is whether or not plaintiff is entitled to compensation at these rates on the weight of the mails including the sacks." *United Fruit Co.* v. *United States*, *supra*.

Regardless of the semantics used by the court below, the facts are crystal clear from the letter of the Acting Assistant Postmaster General to plaintiff dated July 14, 1950, that the Post Office Department has for years followed the "practice not to pay for the weights of sacks used in connection with the dispatch of regular or parcel

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[9] Petitioner's claims are for compensation for empty sacks tendered by the Postmaster General or by his direction, and not for "bringing back the empty sacks" tendered by another country.

post mails or for the 'outbound' return of empty sacks, either in transit through foreign countries or by steamers."

Furthermore, in justification of the practice not to pay for empty sacks, or the sacks used in connection with the mails, the Assistant Postmaster General quoted from the Paris Convention, Article 153, paragraph 7, and Article 161, paragraph 5 (Appendix, pp. 66a-67a) stated that based upon the quoted sections of the Convention the weights of empty sacks are not taken into consideration as regards statistics and transit charge accounts.[10] However, this is not the basis of rates to be paid steamship carriers under the Act of February 14, 1929. (39 U.S.C. § 654(a)).

3. Steamship carriers should not be required to become unwilling partners in generosity between Postal Administrations

The steamship carriers should not be made unwilling partners in the generosity between Governments under Postal Union Conventions through threats of withholding of clearances of vessels upon refusal to accept the mails at rates applied as the Postmaster General may choose. The conflict, confusion and the overall complexities between the postal statutes and provisions of the Postal Union Conventions as interpreted by the lower court should be clarified by this Court.

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[10] Authority for Postal Conventions is contained in 5 U.S.S. § 372 and provides that for the purpose of making better postal arrangements with foreign countries the Postmaster General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and decisions of the Postmaster General construing or interpreting the provisions of any convention if approved by the President, shall be final and conclusive upon all officers of the United States. The interpretation of the Acting Assistant Postmaster General of the provisions of the Paris 1947 Convention (Finding 20) were not approved by the President.

The findings of fact show there was no acquiescence in the payment of compensation on a net weight basis. (Findings 19, 20, 21, 22, 23, 24, 26, 27, 30 and 31).

The Trial Commissioner correctly found that compensation for the transportation of sacks enclosing mail matter was paid only for the net weight of the mails in the sacks; no compensation was paid for the empty sacks transported by plaintiff. (Finding 27).

An analysis of the letter of July 14, 1950 (Finding 20; App. pp. 16a-19a, 46a-48a) from the Acting Assistant Postmaster General shows that no compensation was paid for sacks enclosing the mails; nor for empty sacks sent from the United States to foreign countries to which they belonged for the reason that pursuant to the Convention of Paris 1947 his Department does not charge other Postal Administrations for maritime transportation for the weights of their sacks enclosing their mails, nor for their empty sacks, in the settlement of transit accounts. Of course, the practice followed by the United States is reciprocated by the other Postal Administrations and this is apparently the basis of the lower court holding that—

> This, of course, was equivalent to saying that the rates fixed covered the carriage of sacks, both ways, as well as the articles they contained.

This interpretation by the Postmaster General and applied to all mails and all steamships and followed by the court is incompatible with the authority of the Postmaster General under 39 U.S.C. § 654(a) authorizing him to allow compensation for steamship transportation of mails in case of a foreign vessel not exceeding the maritime rates prescribed in the Convention from time to time. The act does not contemplate that the basis of compensation to vessels of American registry as well as to foreign registry would be equated to the basis of the discounts granted between Postal Administrations in balancing accounts between each

other. The defendant demanded of petitioner the service for which it claims compensation, and, therefore, the primary liability to pay for these services is on the defendant. *United Fruit Co.* v. *United States*, 114 Ct. Cls. 303 (1945); *United Fruit Co.* v. *United States*, 112 Ct. Cls. 519 (1949).

4. The Requirement to carry without compensation constitutes a taking within the prohibition of the Fifth Amendment

In essence, petitioner's suit was for the recovery of the balance of compensation on the weights of sacks as a part of the mails (*United Fruit Co.* v. *United States*, *supra*) required to be transported pursuant to 18 U.S.C. 1724 under a threatened penalty of having clearance of vessel withheld for refusal to accept and transport. Plaintiff not being a free agent to refuse to accept the mails tendered, the required transportation, without compensation for a part of the mails, constitutes a taking of the use of plaintiff's property within the prohibition of the Fifth Amendment to the Constitution. *Pacific Mail Steamship Co.* v. *United States*, 28 Ct. Cls. 1; *New York Central R.R. Co.* v. *United States*, 65 Ct. Cls. 115, affirmed 279 U.S. 73.

CONCLUSION

For the foregoing reasons, the Court is urged to grant this petition for a writ of certiorari to the Court of Claims.

Respectfully submitted,

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February 1, 1962

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

Nos. 460-56 and 568-57

(Decided December 3, 1958)

UNITED FRUIT COMPANY v. THE UNITED STATES

Mr. William I. Denning for plaintiff. *Messrs. Alan F. Wohlstetter, Ernest H. Land,* and *Joseph F. Mullins, Jr.,* were on the briefs.

Mr. Thomas F. McGovern, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for defendant.

ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S THIRD AND FOURTH SPECIAL DEFENSES

WHITAKER, *Judge*, delivered the opinion of the court:

These cases are before the court on plaintiff's motion to strike defendant's third and fourth special defenses. Inasmuch as these defenses raise the question of the jurisdiction of this court, we think it is necessary to now act upon the question raised by them. *Erie Basin Metal Products Co. v. United States*, 123 C. Cls. 433.

In case No. 460-56 plaintiff, a steamship company, sues for compensation for the carriage of mail-sacks from the United States to foreign ports for the period October 1, 1950 to July 31, 1954, and in case No. 568-57, for the period of August 1, 1954 to December 31, 1956. In both petitions it is alleged that, in applying the rates of compensation fixed by the Postmaster General for the carriage of mails, there was deducted the weight of the empty sacks from the

"weight of the sacks and the letters and packages contained therein, and compensation was paid only for the net weight of the mails. It is also alleged that compensation was refused for empty mail sacks returned by plaintiff to the place of origin.

Defendant's third defense, which plaintiff moves to strike, is that jurisdiction of such a suit is within the exclusive jurisdiction of the district courts under the Suits in Admiralty Act (41 Stat. 525; 46 U.S.C. 741-749), and its fourth defense is that the court is called upon to fix rates for the transportation of mails, which defendant alleges is beyond its jurisdiction.

Defendant does not allege that a suit for the carriage of mails is within the exclusive jurisdiction of courts of admiralty, but it says the containers in which the mails are carried are not a part of the mails and that a suit for the carriage of them is within the exclusive jurisdiction of the admiralty courts.

If it be conceded, as we think it must be, that this court has jurisdiction of a suit for compensation for the carriage of the mails, exclusive of the sacks in which the mails are carried, it would seem to border on the absurd to say that it has no jurisdiction of suits to recover compensation for the carriage of the containers themselves. It would indeed be strange if Congress intended that a steamship company should bring its suit in this court for compensation for the carriage of letters and packages, and should have resort to the courts of admiralty to recover compensation for the carriage of the sacks in which the letters and packages were carried.

It has long been recognized that the mail includes not only the letters themselves, but also the containers. It was so held in *United States* v. *Marselis*, 26 Fed. Cas. 1167; *United States* v. *Wilson*, 28 Fed. Cas. 699, 711; *United States* v. *Inabnet*, 31 Fed. 130. Webster's Dictionary defines "mail" as "The bag or bags, with the letters, papers

or other matter contained therein, conveyed under public authority from one post office to another. * * *" Bouvier's Law Dictionary likewise defines it, citing as its authority *United States* v. *Rapp*, 30 Fed. 818.

Congress, in the passage of the Railway Mail Pay Act of 1916, 39 U. S. C. 529, 539, recognized that the sacks were a part of the mails when it authorized the Postmaster General to withdraw empty bags "from the mail" and transmit them by freight or express, and later to return them "to the mails."

Plainly, the carriage of the containers in which the letters are placed is as much a part of the carriage of the mails as is the carriage of the letters themselves. Can one imagine a carrier being required to carry separate pieces of mail without placing them in a container of some sort? Moreover, the return of the empty mail sacks is certainly a necessary adjunct to the carriage of the mails. These mail sacks are used over and over, and, of course, the carriage of the mails involves the return of the empty sacks in order that they might be used again, as the Postal Union Convention of July 11, 1952, recognizes. In Article 169, it provides:

> Barring agreement to the contrary between the corresponding Administrations, sacks must be returned empty, by the next mail, in a direct dispatch for the country to which such sacks belong.
>
> * * * * * * * * *
>
> If the empty sacks to be returned are not too numerous, they may be placed inside the sacks containing the correspondence; otherwise, they must be placed in separate sealed sacks labeled with the names of the exchange offices.

As stated, the defendant does not assert that this court lacks jurisdiction of a suit for compensation for the carriage of the letters and packages themselves, nor could it maintain such an assertion. Nor has it ever been asserted

that the Suits in Admiralty Act was intended to apply to mails. The purpose of the enactment of the Suits in Admiralty Act, *supra*, was to prevent a vessel of the United States, or cargo belonging to the United States, from being tied up by a proceeding *in rem* in admiralty. *Blanchard Bros. v. United States*, 266 U. S. 452; *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575. But no one, before or after the passage of the Suits in Admiralty Act, has ever asserted that by a libel *in rem* a person might tie up the United States mails. *The Merchant*, 17 Fed. Cas. 35; *The Admiral Evans*, 286 Fed. 442.

We do not think that the Suits in Admiralty Act was intended to apply to a suit involving United States mails.

The bench and the bar have never thought that it did. Always it has been assumed without question that the admiralty courts did not have jurisdiction of such suits, and that this court did have jurisdiction. *Steamship Co. v. United States*, 103 U. S. 721; *Pacific Mail Steamship Co. v. United States*, 28 C. Cls. 1; *Luckenbach S. S. Co., v. United States*, 66 C. Cls. 679; 280 U. S. 173; *American-West African Line, Inc. v. United States*, 76 C. Cls. 235, *cert. den.* 290 U. S. 628; *Dollar Steamship Lines v. United States*, 84 C. Cls. 346; *United Fruit Co. v. United States*, 93 C. Cls. 97; *United Fruit Co. v. United States*, 103 C. Cls. 303; *Standard Fruit and Steamship Co. v. United States*, 103 C. Cls. 659; *United Fruit Co. v. United States*, 112 C. Cls. 519; *Moore-McCormack Lines, Inc. v. United States*, 119 C. Cls. 473, *cert. den.* 342 U. S. 876; *United Fruit Co. v. United States*, 134 C. Cls. 315.

Congress also has assumed that this court is the proper forum for such suits, as evidenced by a number of special Acts of Congress conferring jurisdiction thereof on this court.

Furthermore, as we pointed out in *Continental Casualty Co. v. United States*, C. Cls. No. 62-57, decided December 4, 1957, if it be held that the admiralty courts have such juris-

diction, a large part of plaintiff's claim would be barred by the two-year statute of limitations applicable to suits under the Suits in Admiralty Act. Plaintiff quite rightly has assumed that its suit could be brought within the six year period of limitation applicable to suits in this court. If it now be held that such suits must be brought in the admiralty court, then much of plaintiff's claim is barred by the statute of limitations. In view of the long acquiescence by the Government in the bringing of such suits in this court, it cannot now in good conscience assert that such suits must be brought within the two-year period applicable to suits under the Suits in Admiralty Act.

Defendant's fourth special defense is likewise untenable. It there asserts that we have no jurisdiction of plaintiff's cause of action, because, to render a judgment, we would be required to fix rates for the carriage of the empty mail sacks. This is not true. What plaintiff asks us to do is to hold that the sacks were a part of the mails and that it is entitled to compensation based upon the weight of the mails including the sacks, and the weight of the empty sacks returned. The rates are fixed by the Postmaster General. The question presented to us is whether or not plaintiff is entitled to compensation at these rates on the weight of the mails including the sacks. Such a suit is within the jurisdiction of this court.

Plaintiff's motion is granted, and defendant's third and fourth special defenses are stricken.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; and JONES, *Chief Judge*, concur.

IN THE UNITED STATES COURT OF CLAIMS

Nos. 460-56 and 568-57

(Filed July 6, 1960)

UNITED FRUIT COMPANY v. THE UNITED STATES

Report of Commissioner

To the honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

Pursuant to the order of reference in the above-entitled cases the undersigned commissioner herewith makes the following report of his findings of fact:

1. At all times material herein plaintiff was, and is, a corporation organized and existing under the laws of the State of New Jersey.

2. Prior to October 1, 1950, and continuously thereafter, plaintiff operated a steamship line between New York and New Orleans, on the one hand, and various ports in Central and South America, the Panama Canal Zone, and islands in the Caribbean area, on the other. Plaintiff operated approximately four sailings a week out of both New York and New Orleans.

3. Certain of the vessels operated by plaintiff were registered under the flag of the United States and were operated under demise charters from wholly-owned subsidiary companies; certain other vessels were of Honduran registry and were operated under time charters from wholly-owned subsidiaries; other vessels were registered under the flags of various foreign countries and were time

chartered from subsidiary or unrelated companies. Vessels operated under demise charters were manned by plaintiff's employees; crews for the vessels operated under time charters were furnished by the vessel owners. Plaintiff exercised control over the operation of the vessels, whether under demise or time charter, fixed sailing dates and itineraries, provided pier space, and advertised to the general public for cargo and passengers.

4. In its regular operations, plaintiff receives cargo delivered at the pier at the shippers' expense. The cargo is not weighed by plaintiff; the shippers are required by law to give the correct weight and the shippers' declaration of weight is accepted by plaintiff. General cargo moves under bills of lading and, in the case of Government cargo, on Government form bills of lading. The rates for such cargo are fixed either by plaintiff or, in trades where plaintiff is a member of a shipping conference, by the conference, and are on a weight or measurement basis, whichever produces the greater revenue. As is customary in freight tariffs, plaintiff's cargo rates are applied to the gross weight of the freight, including any packaging.

5. At all times involved in these actions, the transportation of mails by ship from United States ports to foreign ports was required by law to be performed at rates fixed by the Postmaster General of the United States.

6. Prior to and during the period October 1, 1950, to August 28, 1952, Section 125.2(b) of the Postal Laws and Regulations, 1948, provided that mails for dispatch by outgoing steamers shall be delivered from the post office and that steamship companies shall haul the sacks to the steamers. This regulation was amended on August 28, 1952 (redesignated Section 125.4(b)) to provide that steamship companies shall be responsible for the transportation and the protection of all incoming and outgoing mails, including parcel post and sacks containing empty equipment (sacks), between the post office and the transporting vessel. The

regulations require that a man ride on the rear of trucks (or wagons) and protect the mail, and that registered (red label) sacks shall be separately delivered to the steamship company's representative at the post office and specially protected during transfers and on board vessels. The order of August 28, 1952, was amended June 30, 1954, so as to relieve the steamship companies of trucking incoming mails from ship to the post office; incoming mails were accepted by the post office on the pier effective on and after August 1, 1954. This amendment was effectuated on August 1, 1954 by the Post Office Department performing the trucking service on incoming mail from pier to the post office.

7. In case No. 460-56, plaintiff seeks to recover (1) compensation for the weight of sacks enclosing mails, and (2) compensation for bundles of empty sacks for the period October 1, 1950, to July 31, 1954, and in case No. 568-57 for the period August 1, 1954 to December 31, 1958. In case No. 568-57, plaintiff also seeks reimbursement for the cost of trucking outgoing mails from the post offices to its vessels. The plaintiff has been paid for the transportation of the mail matter enclosed within the sack but it has received no compensation for the carriage of the sack itself when containing mails or when transported as an empty sack.

8. Mails transported by plaintiff were domestic mails originating in the United States and mails of foreign origin sent to United States post offices at New York, New Orleans and the Canal Zone for further dispatch to third countries. Such mails of foreign origin are designated as "foreign closed transit mails" or "transit mails" and those post offices at ports receiving and transmitting such mails are designated as "exchange offices". Both domestic and foreign closed transit mails, enclosed in canvas sacks or bags consisted of (1) letters, (2) printed matter (prints), (3) parcel post, (4) registered sacks of letters, prints and parcel post, and (5) diplomatic dispatches, classified as prints. Also transported were sacks enclosing empty sacks

being returned by the first steamer available to the country of origin. The empty mail sacks were (1) sacks which had originally enclosed mails sent by steamship to the United States or another foreign country and which were being returned to the country of origin through the United States postal service, and (2) air mail sacks which had enclosed mails flown into the United States and which were being returned by steamship.

9. Prior to and after October 1, 1950, plaintiff transported domestic and transit mails tendered by the Postmasters at New York and New Orleans at the post office platforms for delivery to ports in Central and South America, the Panama Canal Zone, and islands in the Caribbean area. In addition, prior to and subsequent to October 1, 1950, letter and print mails of countries signatory to the Convention of the Postal Union of the Americas and Spain, were tendered at the Canal Zone and other ports for transportation on plaintiff's American flag vessels.

10. Plaintiff's sailing schedules for all of its services were sent to shippers, freight forwarders and other interested persons, and were publicly advertised in the *New York Journal of Commerce* and other shipping publications. Sailing schedules included United States and foreign flag vessels operated by plaintiff. The New York Post Office published a daily bulletin, for the information of its employees and patrons, which listed in advance the sailing time and pier of vessels of United States and foreign registry selected for the dispatch of mails to foreign countries, and the closing time for the mails at the post office.

11. The "Manual of Information for Exchange Offices", which contained instructions from the Post Office Department to the post office employees of United States exchange offices, contains the following:

* * * * * * * * *

Duty of vessels to carry mail tendered:—Except as otherwise provided by treaty or convention, the Post-

master General may require the transportation by any steamships of mail between the United States and any port in another country at the compensation fixed under authority of law.

Arrangements with steamship companies:—It is the function of the exchange offices at ports in the United States and possessions to arrange with the steamship companies for the conveyance of mails and parcel post to other countries or other overseas destinations by vessels sailing from those ports whose schedule and itinerary meet with the regulations, instructions and requirements issued by the Department.

Action should therefore be taken at such exchange offices to obtain information regarding prospective sailings of all vessels by which the mails or parcel post made up by such exchange offices or received from other exchange offices may be dispatched."

The information is obtained by communicating with the steamship companies by telephone or otherwise or through advertisements of the steamship companies or other notices carried in the daily press or other periodicals that may be obtained.

When a steamer is found to be available for the conveyance of mail or parcel post, Form 2966, titled "Steamship Notice—Ocean Mail Service" is mailed to the office of the steamship company or duly authorized agent. The form is self-explanatory and when filled out and returned by the steamship company or agent, furnishes, in addition to the name and registry of the steamer, information to accurately determine (barring later changes) the departure date, ports of call, arrival dates and mails to be conveyed. Changes in the time or date of departure, or ports of call received by telephone should be entered on the Form 2966 to show date and time the information was received and name of steamship official giving the information.

Delivery Time:—Mails are delivered to the representative of the steamship company at the post office. The delivery time or the time the final sack will be delivered to the steamship representative will depend upon the distance from the post office to the steamship

pier and should be as close as practicable to the sailing time of the steamer, to allow for the latest possible closing time of mails at the post office.

. . . . . .

12. During the week preceding the advertised sailing of each of plaintiff's vessels, the postmasters at the exchange offices addressed to plaintiff a printed Form 2906, entitled "Steamship Notice—Ocean Mail Service", for each of plaintiff's advertised vessels and requested for the vessel named in the form by the postmaster, the flag of registry, the date and time of sailing, the pier, the ports of call and the expected dates of arrival. Prior to December 1954, Form 2906 contained the following statement:

> In connection with the dispatch of mails, it is requested that you fill in the blank below for next week, and mail as soon as possible, but no later than *Wednesday* of this week, in enclosed envelope. *It is important that every port of call on the outward trip should be given in the order in which they will be made with the expected date of arrival at each port.* In the event of no departure, or sailing being postponed, you will please note the same hereon, *and return to this office.*
>
> If from any cause it shall be found necessary to postpone or advance the departure of the steamship, immediate notice of the fact should be sent to this office, in order that advertisements and bulletins may be altered accordingly. It frequently occurs that advice of such changes is not received until too late to be of service, and then only from unauthentic sources.
>
> Mails for dispatch by outgoing steamships shall be delivered at the post office, at the time agreed upon, to the respective steamship companies, who must convey them to their steamships.
>
> (After the signature of the postmaster, blank spaces were provided at this point for inserting, after the name of the vessel, the information requested.)
>
> It is understood that the mails shall be carried in accordance with the terms, conditions, and responsibilities prescribed by the Postal Laws and Regulations of

the United States and postal conventions now in effect.

Each truck (or wagon) conveying mail from the post office to the steamship will be provided with a man to ride on the rear seat so as to prevent interference with the mail or the possibility of a sack working loose and falling, unobserved, into the street.

After filling the blanks with the requested information for each vessel, plaintiff signed and returned the form to the postmaster.

The last two paragraphs of Form 2906 were changed in December 1954 to read as follows:

It is understood that the mails shall be carried in accordance with the terms, conditions and responsibilities prescribed by the Laws governing the operation of the Postal Service, title 39 of the Code of Federal Regulations, and postal conventions now in effect.

Each vehicle used to transport mails between post offices and vessels, except the completely closed van type, the mail compartment of which must be locked or sealed, shall be provided with a man to ride on the rear and protect the mail. When a rack type truck is used the sacks shall be covered by a tarpaulin.

13. To carry the mails from the post offices to the piers at New York and New Orleans, plaintiff entered into contracts with trucking companies under which plaintiff paid for the trucking at a minimum rate per bag on week days and at a higher rate per bag for overtime periods, weekends and holidays. The names of the truckmen authorized to receive the mails were furnished to the post offices.

14. The mails for dispatch on a particular steamer were tendered the trucking contractor at the post office platform by post office employees who gave to the truckman a preliminary count of the number of sacks loaded with no indication of whether the sacks contained letters, prints or empty sacks. With the last truckload, the post office furnished Form 2988A, entitled "Waybill of Sacks Dis-

patched", and Form 2988B entitled "Waybill of Diplomatic Dispatch Pouches". Form 2988A listed registered sacks according to country of origin and port of destination; however, only the count of sacks of (1) letters and prints, (2) parcel post, and (3) motion picture films, was shown, without reference to origin. Diplomatic pouches were listed according to origin and destination. A revision of Form 2988A in September 1953 provided space for listing as part of the "mail" advised on the waybill the number of sacks containing empty mail sacks.

15. As required by regulations, the mails were given special care for their protection while being trucked to the pier. They were the last item placed on board the vessel on departing and first off on arrival. On board the vessel, as a security measure, the mails were placed in locked compartments, containers or enclosures.

16. In connection with the weighing of the mails prior to dispatch, the Manual of Information for Exchange Offices stated as follows with regard to letter and print mails:

. . . . . .

Bagging, Sealing, Weighing and Recording

. . . . . .

Payment for the conveyance of mails by steamers to other countries is based on the *net weight* of the mails (rate for letters is more than that for prints). Therefore, in weighing the sacks, the *net weight* is recorded.

. . . . . .

With regard to registered mails, the Manual stated:

. . . . . .

In closing out a dispatch or when a sack is made up at any other time, the articles to be enclosed are weighed before being placed in the sack and the net weight (letters and prints separately) is recorded.

. . . . . .

With regard to parcel post mails, the Manual stated:

. . . . . .

Bulk billed parcels:—Ordinary parcel post packages which are to be advised simply in bulk on the parcel post bill (Form 2974) are placed directly in a sack after separation to the proper exchange office in the country of destination. As each sack is made up, it is entered on the Bagging sheet separately, showing the sack number in consecutive order (commencing with No. 1 for each dispatch), the number of parcels of each weight unit in the sack (if required by the country of destination), and the net weight of the parcels.

. . . . . .

Large Volume:—

. . . . . .

In following this method the parcels for each exchange office are separated by weight unit groups and each group is bagged separately so that all the parcels in a sack will be of the same weight unit group, and it is to be understood that only sacks containing parcels of one weight unit group are to be entered on a single line as the records must show the weight unit of the parcels contained in any sack in case of future inquiry.

. . . . . .

With regard to foreign closed transit mails, the Manual stated:

. . . . . .

Weights:—A record is made of the origin and destination of each foreign closed transit mail dispatched by each steamer, registered and ordinary mails separately. The net weights of the sacks as endorsed on the labels are recorded by countries of origin and destination according to three classifications, letters, prints and parcel post. The weights are totaled according to the requirements of the reports submitted on Forms 2963, 2963(c) and 2963(d).

In connection with the preparation of weekly weight reports, the Manual stated:

. . . . . .

Reports of the Weight of Mails Dispatched by Steamer, Forms 2961, 2961-C, 2961-D

Net weights: The net weight of the mails is the basis upon which payment is made for the transportation of mails on steamships of both United States and foreign registry.

. . . . . .

With regard to the return of empty sacks, the Manual stated:

. . . . . .

Bundles enclosed in sacks of prints: Bundles of empty sacks not numerous enough to form a full sack are tied out with green labels and inserted in a sack of prints for the exchange office to which the sacks are being returned. The weight of the enclosed empty sacks is not included in the net weight of the outside sack.

. . . . . .

Weights: The weights of sacks of empty equipment are not ascertained nor recorded as no compensation is paid for transportation of such sacks by steamships.

17. Prior to their dispatch, the mails are weighed in a post office workroom from which the general public is excluded. Letter mails were enclosed in sacks and weighed on scales which were preset for the tare weights of sacks used, and the indicated net weight of the mails enclosed was recorded for compensation purposes. Print mails are similarly weighed on a platform scale, a deduction being made for the weight of the enclosing sack, and the net weight thereof recorded. The sacks of parcel post mail were not weighed. Before being placed in sacks, the parcels were grouped according to the weights as recorded for postage purposes. However, these actual weights were not the weights recorded on forms sent to the steamship companies; instead, the post office recorded an estimated average weight of the parcels, before being placed in sacks. With respect to the foreign closed transit mails, only the

net weights of the letters, prints and parcel post mails were recorded. The sacks enclosing empty mail sacks transported by plaintiff were handled in the same workroom as other domestic mails and were not weighed nor was any record of their weight maintained by the post offices.

18. Approximately a week or ten days after sailing the Post Office Department furnished plaintiff with a statement on Form 2963 of the weights of mails dispatched showing the weights of letters, prints and parcel post of United States origin and, separately, the weights of letters, prints and parcel post of foreign closed transit mails according to port of destination. The weight statements did not indicate whether the weights shown were net or gross weights. The weight statements did not show the number of bags and the weights shown could not be identified with the sacks as listed on the post office waybills.

19. On June 16, 1950, the plaintiff by its vice president sent a letter to the Assistant Postmaster General by the terms of which it protested against the defendant's refusal to pay for the transportation of mail sacks whether they did or did not contain mail by ships operated by the plaintiff under the American flag from ports in the United States to foreign ports.

20. On July 14, 1950, the Acting Assistant Postmaster General, Bureau of Transportation, wrote plaintiff in part as follows:

> In this connection your attention is called to the following Sections of the 1948 Postal Laws and Regulations:
>
> Section 1207 paragraph 2(b). *Default Rates.* Unless otherwise specially provided, payment shall be made for the transportation of United States mails and foreign closed transit mails on steamships of both United States registry and foreign registry, and for the transportation to the United States of mails which the United States is obligated to convey, at the rates of 8.8 cents a pound for mails consisting of letters and

postcards and 1.1 cents a pound for mails consisting of other articles, including parcel post, for distances up to and including 300 nautical miles; 2.7 cents a pound for mails consisting of letters and postcards and 2.9 cents a pound for mails consisting of other articles, including parcel post, for distances from 300 up to and including 1,500 nautical miles, and 3.5 cents a pound for mails consisting of letters and postcards and 4.7 cents a pound for mails consisting of other articles, including parcel post, for distances exceeding 1,500 nautical miles.

Section 1253. *Duty of vessels to carry mail transported.* Except as otherwise provided by treaty or convention *the Postmaster General may require the transportation by any steamships of mail between the United States and any foreign port at the compensation fixed under authority of law.* Upon refusal by the master or the commander of such steamship or vessel to accept the mail, when tendered by the Postmaster General or his representative, the collector or other officer of the port empowered to grant clearance, on notice of the refusal aforesaid, shall withhold clearance until the collector or other officer of the port is informed by the Postmaster General or his representative that the master or commander of the steamship or vessel has accepted the mail or that conveyance by his steamship or vessel is no longer required by the Postmaster General. (62 Stat. 784; 18 U.S.C. 1724.) (Italics supplied.)

The Postmaster General has the lawful authority to set the rates of compensation for the transportation of United States mails on steamers sailing to foreign destinations.

With very few exceptions, to our knowledge, it is the universal practice not to pay for the weight of sacks used in connection with the dispatch of regular or parcel post mails, or for the return of empty sacks, either in transit through foreign countries or by steamers. Compensation is paid on the net weight of the mail involved. This practice has been followed for a great number of years and is apparently based on the following provisions of the Universal Postal Union

Convention, the present one being that of Paris of July 5, 1947:

Article 153, paragraph 7. In regard to sacks which contain nothing but empty sacks, or correspondence exempt from all transit charges (Article 68 of the Convention), the note Statistique is followed by the word Exempt.

Article 161, paragraph 5. *Transit charge account. In order to take account of the weight of the sacks and packing*, as well as of the classes of correspondence exempt from all transit charges, in accordance with the provisions of Article 68 of the Convention, the total amount of the account for closed mails is reduced by 10 percent. (Italics supplied.)

It will be noted from the quoted Sections of the Universal Postal Union Convention that the weights of empty sacks are not taken into consideration as regards statistics and transit charge accounts. This necessitates our charging other postal administrations for the net weights of any foreign closed transit mails handled by the United States and vice versa.

A meeting of the Technical Transit Committee of the Universal Postal Union was held in Interlaken, Switzerland, during June of 1949, for the purpose of revising the Convention and regulations covering the handling and charges involved in connection with foreign closed transit mails. At that meeting the weight of sacks, as well as the return of empty sacks, was an important item on the agenda.

Owing to the complexities of the overall problem and the different viewpoints of various administrations, final decision was not arrived at during the Interlaken meeting. However, the matter has been and is receiving the attention of the various postal administrations and another meeting of the Technical Transit Committee is scheduled to take place in Switzerland during May or June of 1951, at which time the Committee will make definite recommendations for consideration at the next Congress of the Universal Postal Union to be held in Brussels, Belgium, in 1952.

We are sympathetic towards your problem and agree it is necessary that some action be taken towards

> adopting a universally uniform system as regards possible payment for the weight of sacks used in connection with the dispatch of mails as well as for the return of empty equipment. However, until such time as a change in procedure might be adopted by the Universal Postal Union, we regret it will be necessary for you to accept any mails tendered to steamers of the United Fruit Company by the United States postal authorities in accordance with the rules and regulations as set forth by the Postmaster General.

The emphasis by italic in 125.3 and Article 161 appears in the Department's letter by underscoring.

Plaintiff understood that under the rules and regulations as set forth by the Postmaster General plaintiff was obligated to accept the mails on any and all of its ships that sailed from United States ports.

21. The plaintiff sent a further letter to the Assistant Postmaster General on September 29, 1950 in which it persisted in its earlier position and requested that it be furnished with information as to the weight of sacks carried, as follows:

> . . . . . .
>
> Neither the weights of sacks containing mails nor the weights of empty sacks, are furnished by postmasters. Therefore, it is respectfully requested that the postmasters tendering mails to our vessels be directed to furnish statements of weights of sacks at the time net weight statements of mails are furnished. It is requested that the postmasters report (a) weights of sacks containing letter mails; (b) weights of sacks containing all other mails; (c) weights of sacks containing parcel post; and (d) weights of empty sacks.

22. On and after October 1, 1950, the Post Office Department continued to tender mails to plaintiff, and the United States postal authorities in the Canal Zone and postal administrations in the Caribbean area began to furnish plaintiff with the gross weights of mails dispatched on plaintiff's

vessels. Plaintiff filed public vouchers with the Post Office Department for compensation on the basis of the gross weights furnished. These claims were disallowed and the Post Office Department revised the vouchers and made payment on the basis of the net weights of the mails transported.

23. On November 14, 1950, the Director of Posts, Balboa Heights, Canal Zone, wrote plaintiff in part as follows:

> The question of furnishing the weight of equipment containing mail was referred to Mr. John M. Redding, Assistant Postmaster General to whom you refer in your letter, and I am enclosing a copy of his reply.
>
> In view of his statement that no instructions have been issued to exchange offices dispatching mails to furnish such weights and that the matter is under study, it will be necessary for us to discontinue showing the weights of equipment on our waybills, as stated in my reply to you under date of October 31, 1950, until such time as a change in policy is made by the Post Office Department in Washington.

The letter of Assistant Postmaster General Redding to the Director of Posts, dated November 9, 1950, reads in part as follows:

> I have not talked to anyone from the United Fruit Company about this subject as alleged in the letter to you and no instructions to furnish such weights have been issued by my office to the exchange offices dispatching the mails.
>
> The matter of pay for the transportation of the equipment[1] is being considered and if decision is reached making a change in our present policy you will be informed accordingly.

24. On May 14, 1951, the Assistant Postmaster General, Bureau of Transportation, wrote to plaintiff's Washington attorney as follows:

[1] This means mail bags.

> I refer to your letter of October 3, 1960, and your visit here on Friday, May 11, 1961, relative to compensation for transportation of mail sacks tendered by postmasters of the United States for carriage on American flag steamers.
>
> The matter of handling and possible payment for empty mail sacks is on the agenda for discussion at the Technical Transit Committee of the Universal Postal Union to be held in Montreux, Switzerland next month. Upon the return of our delegation from this meeting, I feel certain that we will be in a position to give you some definite advice on the subject.

25. The territorial and maritime transit rates in the 1947 Paris Convention (Article 67) were the basis of charges on the gross weights of letters and post cards and other articles (not including parcel post) exchanged in closed mails between two postal administrations for the benefit of the country whose services participate in the conveyance by means of the services of one or more other postal administrations. A new Convention was signed in Brussels in 1952, effective July 1, 1953, which eliminated the distinction between letters and post cards and other articles in the rates for territorial and maritime transit charges (Article 78). Again, the rates were applicable to the gross weights of letters and other articles, not including parcel post. Article 78 further provides that:

> Maritime transit begins at the moment when the dispatches are put under hoist and ends when they have been unloaded at the wharf.

Under Section 654(a), of Title 39 U.S.C., the Postmaster General may allow compensation, to foreign flag steamships, for the transportation of any and all mails, including parcel post, not exceeding the rates prescribed in the Conventions; and to United States flag vessels, he may allow compensation not exceeding 80 cents a pound for letters and 8 cents a pound for other articles, including parcel post.

26. The Postal Regulations were amended effective August 1, 1954, removing the requirement that steamship companies truck incoming mails from the vessel to the post office, but leaving intact the requirement that outgoing mails be trucked from post office to pier; and establishing new rates of payment for the transportation of United States mails and foreign closed mails on steamships of United States and foreign registry.

27. Compensation to plaintiff for the transportation of sacks enclosing mail matter was paid only for the net weight of the mails in the sacks; no compensation was paid for the empty mail sacks transported by plaintiff. While the rates of compensation were discussed with representatives of the steamship industry, the Postmaster General had the sole authority to fix compensation for steamship transportation of the mails. There was no evidence that the rates of compensation were based on any record developed by the Postmaster General to determine the costs to the steamship companies of performing either the maritime transportation of the mails or the trucking from the post offices to the piers.

28. The Department's practice of paying for the transportation of the mails on net weights is a long existing one, and apparently arose under R.S. § 4009 which provided that for transporting the mail between the United States and any foreign port the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship, any sum not exceeding the sea postage, on the mails so transported. This section, printed as § 1405, Postal Laws and Regulations, 1924, was followed by a note reading as follows:

> *Note.* In view of the provisions of the Universal Postal Union Convention the term "sea postage" has no meaning. United States steamships receive not exceeding the whole of the postage collected on the articles contained in the mails conveyed by said vessels;

and foreign vessels are paid any sum not exceeding the rate of postage fixed for a single maritime transit by the Universal Postal Union Convention in force at such time.

The Act of July 3, 1926, entitled "An Act to Amend Section 4009 of the Revised Statutes," provided that for transportation of the mails the Postmaster General may allow a vessel of the United States compensation not in excess of the amount of postage collected on the mail transported on such vessel, and in case of a foreign vessel compensation not in excess of the sea transit rates prescribed by the Universal Postal Union Convention. The Act of February 14, 1929, entitled "An Act to prescribe more definitely the rates for compensation payable to steamships of United States registry for transportation of foreign mails," amended the Act of July 3, 1926, so as to provide that the Postmaster General may allow to United States vessels compensation on a weight basis of not exceeding 80 cents a pound for letters and 8 cents a pound for other articles, including parcel post, 39 U.S.C. § 654(a).

29. The rates paid by the Department to the railroads for the territorial transit of the mails are fixed by the Interstate Commerce Commission and provide for compensation on a space, rather than weight, basis including the space occupied by sacks enclosing other mail matter and space occupied by empty mail sacks. Similarly, the Department compensates the airlines for the total weight of the mails carried, making no deduction for the weight of the bags containing mail.

30. On January 20, 1956, plaintiff submitted to the Post Office Department public vouchers for compensation for the transportation of sacks enclosing the mails and empty mail sacks during the period October 1, 1950 through July 31, 1954. By letter dated October 12, 1956, the vouchers were returned unpaid by the Post Office Department.

31. On October 31, 1957, and March 6 and March 24, 1959, plaintiff submitted to the Post Office Department pub-

lic vouchers (1) for compensation for the ocean transportation of sacks enclosing the mails and of empty mail sacks and (2) for reimbursement for trucking the mails from the post offices to the piers, during the period August 1, 1954, through December 31, 1958. The claim for reimbursement for the cost of trucking was based on the cost to plaintiff per bag under its cartage contracts, plus administrative expense of three percent. By letters dated January 6, 1958, and March 13 and 25, 1959, the Post Office Department denied plaintiff's claims.

32. No compensation was allowed or paid for the weights of sacks enclosing the mails or for the weights of empty mail sacks. The parties have stipulated the weights of sacks enclosing the mails and the weights of empty sacks transported by plaintiff and the amounts due in the event the Court finds plaintiff should recover, either completely or in part. The amount due for weights of sacks enclosing the mails is calculated at rates fixed and paid by the Postmaster General for the weight of the mails enclosed in such sacks. The amount due for the empty sacks transported during the period October 1, 1950 through July 31, 1954, is calculated at rates fixed and paid by the Postmaster General for "all other articles" of mail matter, and for the period August 1, 1954, through December 31, 1958, when a single rate was applicable to all categories of mails, at the same rate fixed and paid for other mails dispatched and transported on plaintiff's vessels.

33. No compensation was allowed for the trucking or cartage of mails from post offices to piers in the payments for the transportation of mails on a net weight basis after August 1, 1954, and the parties have stipulated the amounts due for such trucking at the cost to plaintiff per bag under the contracts between plaintiff and its trucking contractors at New York and New Orleans, plus 3 percent additional to cover administrative costs.

34. In the event the Court finds that the plaintiff is entitled to recover, either completely or in part, the parties

have agreed that the following table is a correct computation of the amount due the plaintiff by periods, by the flag of the carrying ship and for cartage:

Period October 1, 1930–July 31, 1934 (Case No. 160-56)

1	American	$56,496.94
2	Honduran	1,671.98
3	European	3,808.64
4	American	37,272.50
5	Honduran	4,000.66
6	European	5,553.78
7	American	9,123.16
8	American	2,081.90
9	European	1,189.64
10	Honduran	584.71
11	American	6,973.14
12	American	16,196.74
	Total	148,965.79

Period August 1, 1934–December 31, 1938 (Case No. 508-57) Claim for Weight of Sacks

Flag of vessel:

American	$73,315.91
Honduran	23,233.52
Foreign	25,850.42
Total	122,399.85

Cartage claims:

Cartage	$143,076.78
Administrative expense (3%)	4,352.30
Total	149,429.08
Grand total	$415,794.72

Respectfully submitted.

WILLIAM E. DAY, *Commissioner.*

IN THE UNITED STATES COURT OF CLAIMS

Nos. 460-56 and 568-57

(Decided April 7, 1961)

UNITED FRUIT COMPANY v. THE UNITED STATES

William I. Denning for plaintiff. *Alan F. Wohlstetter, Ernest H. Land,* and *Joseph F. Mullins, Jr.,* were on the briefs.

Thomas F. McGovern, with whom was *Assistant Attorney General William H. Orrick,* for the defendant. *Learned Colby* was on the brief.

Opinion

LARAMORE, *Judge,* delivered the opinion of the court:

These are two cases resulting from a long standing dispute between plaintiff and the United States concerning compensation for the transportation of mails by steamship. In both cases plaintiff sues for compensation for the carriage of mail sacks between the United States and foreign ports, in No. 460-56, for the period October 1, 1950 to July 31, 1954, and in No. 568-57, for the period August 1, 1954 to December 31, 1956. Also, in No. 568-57, plaintiff claims compensation for the transportation of mails from the post offices to its vessels for the period August 1, 1954 to December 31, 1956.

During the periods involved plaintiff operated a steamship line between New York or New Orleans, on the one hand, and various ports in Central and South America, the Panama Canal Zone, and islands in the Caribbean area, on the other. Some of the vessels operated by plaintiff were registered under the flag of the United States, some under

the flag of Honduras, and certain others were of European registry.

The mails transported by plaintiff during the periods in question consisted of letters, prints, parcel post, registered mail and diplomatic dispatches, and were both domestic mails and mails of foreign origin. All of the pieces of mail were in mail sacks. Plaintiff also transported mail sacks containing empty sacks being returned to the country of origin. Most of these empty sacks were sacks which had originally contained mails sent by steamship to the United States or to a foreign country, and which were being returned to the country of origin through the United States postal service; some of them were air mail sacks which had contained mails flown into the United States and which were being returned by steamship. Defendant confesses liability for proper compensation for the carriage of the latter sacks.

Section 1724, 18 U.S.C., as amended by the Act of September 25, 1951 (65 Stat. 336), authorizes the Postmaster General to require the transportation of mail at a compensation authorized by law. The statute appears in a note below.[1]

Section 125.2(b) of the Postal Laws and Regulations (1948) required that plaintiff receive all outgoing mail at

[1] "§ 1724. Except as otherwise provided by treaty or convention the Postmaster General may require the transportation by any steamships of mail between the United States and any foreign port at the compensation fixed under authority of law. Upon refusal by the master or the commander of such steamship or vessel to accept the mail, when tendered by the Postmaster General or his representative, the collector or other officer of the port empowered to grant clearance, on notice of the refusal aforesaid, shall withhold clearance until the collector or other officer of the port is informed by the Postmaster General or his representative that the master or commander of the steamship or vessel has accepted the mail or that conveyance by his steamship or vessel is no longer required by the Postmaster General."

the post offices to be transported by truck to plaintiff's vessels for transportation to foreign ports, and also required plaintiff to deliver to the post offices all incoming mail. The regulations as amended on June 30, 1954, relieved plaintiff of the duty of bringing incoming mails from the vessels to the post offices; incoming mails were accepted by the post offices on the piers, effective August 1, 1954.

The law, which was the Act of February 14, 1929 (45 Stat. 1159), 39 U.S.C. 654(a), authorized the Postmaster General to fix the rates of compensation for the transportation of the mails by steamship at not more than 80 cents a pound for letters and 8 cents a pound for other articles, including parcel post. Pursuant to this authority, he fixed the rates set out in paragraph (3)(b) of section 120.7 of the same Postal Laws and Regulations (1948). This paragraph reads:

> *Definite rates.* Unless otherwise specially provided, payment shall be made for the transportation of United States mails and foreign closed transit mails on steamships of both United States registry and foreign registry, and for the transportation to the United States of mails which the United States is obligated to convey, at the rate of 8.8 cents a pound for mails consisting of letters and postcards and 1.1 cents a pound for mails consisting of other articles, including parcel post, for distances up to and including 300 nautical miles; 23.7 cents a pound for mails consisting of letters and postcards and 2.9 cents a pound for mails consisting of other articles, including parcel post, for distances from 300 up to and including 1,500 nautical miles, and 35.5 cents a pound for mails consisting of letters and postcards and 4.7 cents a pound for mails consisting of other articles, including parcel post, for distances exceeding 1,500 nautical miles.

In applying the rates of compensation as fixed by the Postmaster General, there was deducted the weight of the mail sacks from the weight of the sacks with the letters and packages contained therein, and compensation was paid

based upon the net weight of the mails. No additional compensation was paid for returning the empty sacks.

The question presented is whether the rates of compensation fixed by the Postmaster General were intended to cover all the services required in order to transport the letters, postcards, and other articles, including parcel post.

So far as the transportation of the sacks containing the mail is concerned, we think the rate fixed by the Postmaster General for the carriage of the letters and postcards covered the carriage of the sacks which contained them. It would have been impossible to have carried the letters and postcards without putting them in something. In order to carry them, for which the stated rate was to be paid, the steamship company had to carry the sacks. Had there been any intention to pay additional compensation for the carriage of the sacks, the regulations would have said so. The absence of a provision for payment of additional compensation for their carriage would seem to show that none was to be paid.

The provision for payment for the carriage of "other articles, including parcel post," referred to the contents of the sacks, not to the sacks themselves. The preceding specific clause clearly referred to the contents and presumably the following general clause did so also. This is in accord with the rule of *ejusdem generis*.

The sacks were valuable and were used over and over. So, both parties knew that in order to carry the letters and postcards the steamship company had to bring the sacks back. It would seem that the rate fixed for carrying the letters and postcards, not only covered carrying the sacks in which they were contained, but also covered bringing back the empty sacks.

As the Commissioner's findings show, the practice of paying compensation for the carriage of the letters and postcards and the sacks in which they were contained,

based on the weight of the letters and postcards alone, was of long standing. For a very long time the course of action of the Post Office Department shows that it intended the compensation fixed for the carriage of the letters and postcards to include the carriage of the things containing the letters and postcards. No additional compensation has ever been paid for the carriage of the sacks or for the return of them.

For a long time the steamship companies did not protest against this. (They say that they did not protest because they did not know the basis used by the Post Office Department in computing their compensation. This is a lame excuse. It would have been simple enough for them to have found out the basis of computation, if it is true that the Post Office Department would not tell them, by weighing the mails themselves.) More recently they have protested. On June 16, 1950, prior to the period for which compensation is sought in this suit, plaintiff's vice president wrote the Postmaster General saying that for a long time they had protested non-payment of additional compensation for the carriage of the sacks, and it served notice that it would expect additional compensation in the future.

The Acting Assistant Postmaster General replied on July 14, 1950, in which he quoted the regulation fixing the rates and the duty of the steamship companies to carry the mails and then said:

> With very few exceptions, to our knowledge, it is the universal practice not to pay for the weight of sacks used in connection with the dispatch of regular or parcel post mails or for the return of empty sacks, either in transit through foreign countries or by steamers. Compensation is paid on the net weight of the mail involved. This practice has been followed for a great number of years and is apparently based on the following provisions of the Universal Postal Union Convention, the present one being that of Paris of July 5, 1947: * * *

He said further that the matter was under study by a committee of the Universal Postal Union, and he concluded:

> We are sympathetic towards your problem and agree it is necessary that some action be taken towards adopting a universally uniform system as regards possible payment for the weight of sacks used in connection with the dispatch of mails as well as for the return of empty equipment. However, until such time as a change in procedure might be adopted by the Universal Postal Union, we regret it will be necessary for you to accept any mails tendered to steamers of the United Fruit Company by the United States postal authorities in accordance with the rules and regulations as set forth by the Postmaster General.

This letter was written prior to the period involved in the present suits. It stated what the long continued practice had been and that this practice would be continued until changed by the Universal Postal Union. That practice was to pay for the carriage of the letters and postcards and other articles and the sacks in which they were contained, and for the return of the empty sacks, on the basis of the weight of the letters and postcards and other articles, exclusive of the sacks.

In short, plaintiff's protest was rejected, and it was stated that the ancient practice would be continued.

This, of course, was equivalent to saying that the rates fixed covered the carriage of the sacks, both ways, as well as the articles which they contained. Since the Postmaster General had the authority to fix the rates, this would seem to conclude the matter.

As the findings show, the Postal Union Convention held subsequent to the date of the letter of the Assistant Postmaster General, to wit, the Brussels Convention of 1952, refused to change the basis for the payment of compensation, and continued to compute it on the net weight of the contents of the sacks.

This leaves the claim for compensation for picking up the mail at the post offices and taking it to the steamships. It will be recalled that section 1724 of Title 18 U.S.C., as amended, authorized the Postmaster General to "require the transportation by any steamships of mail between the United States and any foreign port at the compensation fixed under authority of law." As stated above, section 125.2(b), as amended, required the steamship companies to come to the post office to pick up the outgoing mail. The rates fixed by the Postmaster General were intended by him to cover compensation for this service, as well as the transportation by sea.

As we said above, in discussing the claim for additional compensation for the carriage of the sacks, if it had been intended to pay additional compensation for their transportation, the regulations fixing rates would have said so. The failure to provide for additional compensation indicates that the rates fixed for the carriage of the letters, etc., included all services incidental thereto, and that embraced the duty, in the opinion of the Postmaster General, of coming to the post office to get the outgoing mail.

For many years prior to 1954, steamship companies had been required to pick up outgoing mail at the post office and to deliver incoming mail to the post office. As far back as 1889 the Assistant Attorney General in charge of post office matters rendered an opinion in which he said:

> It has before been stated that the transfer of all mails between steamships and post office at New York and elsewhere is made by the steamship companies and at their expense, and the compensation to such steamships is supposed to cover the cost of this service; in other words, that the compensation is for the transfer at ports of arrival and departure as well as for the conveyance by sea. There is therefore an implied contract between the United States and every vessel carrying mails to and from the United States and foreign ports that the latter will pay all the expense of moving said mails out of and into the post office; and this

implied contract has assumed the force of positive written agreement, sustained by an unbroken line of precedents running through many years. * * *" 12 Op. Assist. Att. Gen. for Post Office Dept., p. 765.

Since the Postmaster General in fixing the rates of compensation, acted within his authority, and since it seems that the rates fixed were intended to cover the transportation of mail to and from the post offices, until 1954, and thereafter to cover transportation of outgoing mail from the post offices to the pier, we are of opinion plaintiff is not entitled to recover therefor.

What we have said above, however, does not apply to empty sacks brought back to the place of origin by plaintiff's steamships, but which had been used in the transportation of letters, etc., by airplane. There was no duty on plaintiff as a carrier of the mails to return these sacks to the place of origin, and when plaintiff was requested to do so and it did so, it was entitled to compensation therefor.

So far as the basis for plaintiff's compensation is concerned, in returning the sacks it was not acting as a carrier of the mails, since it had not used them to carry the letters, etc., from the point of origin. It was acting only as a carrier of cargo. Its relationship to the sacks was no different from its relationship to any other cargo. But, so far as our jurisdiction is concerned, these empty sacks were an adjunct of the United States mails and, as such, were exempt from a libel *in rem* in the courts of admiralty. As we stated in our former opinion in this case, 144 Ct. Cl. 154, we do not think the Suits in Admiralty Act (41 Stat. 525) was intended to apply to a suit involving the carriage of the mails; nor do we think it applies to the carriage of something so intimately connected with the carriage of the mails as a mail sack.

Defendant admits plaintiff is entitled to compensation for the carriage of these sacks, but it does not state to us how it thinks it ought to be computed. Since plaintiff had

a published tariff for the carriage of empty mail sacks, it would appear it is entitled to be compensated on the basis of this tariff.

Plaintiff is entitled to recover for the last mentioned item, and judgment will be entered to that effect. The amount of recovery will be determined pursuant to Rule 38(c).

It is so ordered.

REED, *Justice (Ret.)*, sitting by designation; DURFEE, *Judge*; MADDEN, *Judge*; and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner William E. Day, and the briefs and argument of counsel, makes findings of fact as follows:

1. At all times material herein plaintiff was, and is, a corporation organized and existing under the laws of the State of New Jersey.

2. Prior to October 1, 1950, and continuously thereafter, plaintiff operated a steamship line between New York and New Orleans, on the one hand, and various ports in Central and South America, the Panama Canal Zone, and islands in the Caribbean area, on the other. Plaintiff operated approximately four sailings a week out of both New York and New Orleans.

3. Certain of the vessels operated by plaintiff were registered under the flag of the United States and were operated under demise charters from wholly-owned subsidiary companies; certain other vessels were of Honduran registry and were operated under time charters from wholly-owned subsidiaries; other vessels were registered under the flags of various foreign countries and were time chartered from subsidiary or unrelated companies. Vessels operated under demise charters were manned by plaintiff's employees; crews for the vessels operated under time

charters were furnished by the vessel owners. Plaintiff exercised control over the operation of the vessels, whether under demise or time charter, fixed sailing dates and itineraries, provided pier space, and advertised to the general public for cargo and passengers.

4. In its regular operations, plaintiff receives cargo delivered at the pier at the shippers' expense. The cargo is not weighed by plaintiff; the shippers are required by law to give the correct weight and the shippers' declaration of weight is accepted by plaintiff. General cargo moves under bills of lading and, in the case of Government cargo, on Government form bills of lading. The rates for such cargo are fixed either by plaintiff or, in trades where plaintiff is a member of a shipping conference, by the conference, and are on a weight or measurement basis, whichever produces the greater revenue. As is customary in freight tariffs, plaintiff's cargo rates are applied to the gross weight of the freight, including any packaging.

5. At all times involved in these actions, the transportation of mails by ship from United States ports to foreign ports was required by law to be performed at rates fixed by the Postmaster General of the United States.

6. Prior to and during the period October 1, 1950, to August 28, 1952, Section 125.2(b) of the Postal Laws and Regulations, 1948, provided that mails for dispatch by outgoing steamers shall be delivered from the post office and that steamship companies shall haul the sacks to the steamers. This regulation was amended on August 28, 1952 (redesignated Section 125.4(b)) to provide that steamship companies shall be responsible for the transportation and the protection of all incoming and outgoing mails, including parcel post and sacks containing empty equipment (sacks), between the post office and the transporting vessel. The regulations require that a man ride on the rear of trucks (or wagons) and protect the mail, and that registered (red label) sacks shall be separately delivered to the

steamship company's representative at the post office and specially protected during transfers and on board vessels. The order of August 28, 1952, was amended June 30, 1954, so as to relieve the steamship companies of trucking incoming mails from ship to the post office; incoming mails were accepted by the post office on the pier effective on and after August 1, 1954. This amendment was effectuated on August 1, 1954 by the Post Office Department performing the trucking service on incoming mail from pier to the post office.

7. In case No. 460-56, plaintiff seeks to recover (1) compensation for the weight of sacks enclosing mails, and (2) compensation for bundles of empty sacks for the period October 1, 1950, to July 31, 1954, and in case No. 568-57 for the period August 1, 1954 to December 31, 1958. In case No. 568-57, plaintiff also seeks reimbursement for the cost of trucking outgoing mails from the post offices to its vessels. The plaintiff has been paid on the basis of the weight of the mail matter enclosed within the sack. It seeks additional compensation based on the weight including the sacks and for the transportation of the empty sacks.

8. Mails transported by plaintiff were domestic mails originating in the United States and mails of foreign origin sent to United States post offices at New York, New Orleans and the Canal Zone for further dispatch to third countries. Such mails of foreign origin are designated as "foreign closed transit mails" or "transit mails" and those post offices at ports receiving and transmitting such mails are designated as "exchange offices". Both domestic and foreign closed transit mails, enclosed in canvas sacks or bags consisted of (1) letters, (2) printed matter (prints), (3) parcel post, (4) registered sacks of letters, prints and parcel post, and (5) diplomatic dispatches, classified as prints. Also transported were sacks enclosing empty sacks being returned by the first steamer available to the country of origin. The empty mail sacks were (1) sacks which had

originally enclosed mails sent by steamship to the United States or another foreign country and which were being returned to the country of origin through the United States postal service, and (2) air mail sacks which had enclosed mails flown into the United States and which were being returned by steamship.

9. Prior to and after October 1, 1950, plaintiff transported domestic and transit mails tendered by the Postmasters at New York and New Orleans at the post office platforms for delivery to ports in Central and South America, the Panama Canal Zone, and islands in the Caribbean area. In addition, prior to and subsequent to October 1, 1950, letter and print mails of countries signatory to the Convention of the Postal Union of the Americas and Spain, were tendered at the Canal Zone and other ports for transportation on plaintiff's American flag vessels.

10. Plaintiff's sailing schedules for all of its services were sent to shippers, freight forwarders and other interested persons, and were publicly advertised in the *New York Journal of Commerce* and other shipping publications. Sailing schedules included United States and foreign flag vessels operated by plaintiff. The New York Post Office published a daily bulletin, for the information of its employees and patrons, which listed in advance the sailing time and pier of vessels of United States and foreign registry selected for the dispatch of mails to foreign countries, and the closing time for the mails at the post office.

11. The "Manual of Information for Exchange Offices", which contained instructions from the Post Office Department to the post office employees of United States exchange offices, contains the following:

* * * * * * * * * * *

> *Duty of vessels to carry mail tendered:*—Except as otherwise provided by treaty or convention, the Postmaster General may require the transportation by any

steamships of mail between the United States and any port in another country at the compensation fixed under authority of law.

Arrangements with steamship companies:—It is the function of the exchange offices at ports in the United States and possessions to arrange with the steamship companies for the conveyance of mails and parcel post to other countries or other overseas destinations by vessels sailing from those ports whose schedule and itinerary meet with the regulations, instructions and requirements issued by the Department.

Action should therefore be taken at such exchange offices to obtain information regarding prospective sailings of all vessels by which the mails or parcel post made up by such exchange offices or received from other exchange offices may be dispatched.

The information is obtained by communicating with the steamship companies by telephone or otherwise or through advertisements of the steamship companies or other notices carried in the daily press or other periodicals that may be obtained.

When a steamer is found to be available for the conveyance of mail or parcel post, Form 2906, titled "Steamship Notice—Ocean Mail Service" is mailed to the office of the steamship company or duly authorized agent. The form is self-explanatory and when filled out and returned by the steamship company or agent, furnishes, in addition to the name and registry of the steamer, information to accurately determine (barring later changes) the departure date, ports of call, arrival dates and mails to be conveyed. Changes in the time or date of departure, or ports of call received by telephone should be entered on the Form 2906 to show date and time the information was received and name of steamship official giving the information.

Delivery Time:—Mails are delivered to the representative of the steamship company at the post office. The delivery time or the time the final sack will be delivered to the steamship representative will depend upon the distance from the post office to the steamship pier and should be as close as practicable to the sailing

time of the steamer, to allow for the latest possible closing time of mails at the post office.

12. During the week preceding the advertised sailing of each of plaintiff's vessels, the postmasters at the exchange offices addressed to plaintiff a printed Form 2906, entitled "Steamship Notice—Ocean Mail Service", for each of plaintiff's advertised vessels and requested for the vessel named in the form by the postmaster, the flag of registry, the date and time of sailing, the pier, the ports of call and the expected dates of arrival. Prior to December 1954, Form 2906 contained the following statement:

> In connection with the dispatch of mails, it is requested that you fill in the blank below for next week, and mail as soon as possible, but no later than *Wednesday* of this week, in enclosed envelope. *It is important that every port of call on the outward trip should be given in the order in which they will be made with the expected date of arrival at each port.* In the event of no departure, or the sailing being postponed, you will please note the same hereon, *and return to this office*.
>
> If from any cause it shall be found necessary to postpone or advance the departure of the steamship, immediate notice of the fact should be sent to this office, in order that advertisements and bulletins may be altered accordingly. It frequently occurs that advice of such changes is not received until too late to be of service, and then only from unauthentic sources.
>
> Mails for dispatch by outgoing steamships shall be delivered at the post office, at the time agreed upon, to the respective steamship companies, who must convey them to their steamships.
>
> (After the signature of the postmaster, blank spaces were provided at this point for inserting, after the name of the vessel, the information requested.)
>
> It is understood that the mails shall be carried in accordance with the terms, conditions, and responsibilities prescribed by the Postal Laws and Regulations

of the United States and postal conventions now in effect.

Each truck (or wagon) conveying mail from the post office to the steamship will be provided with a man to ride off the rear so as to prevent interference with the mail or the possibility of a sack working loose and falling, unobserved, into the street.

After filling the blanks with the requested information for each vessel, plaintiff signed and returned the form to the postmaster.

The last two paragraphs of Form 2906 were changed in December 1954 to read as follows:

It is understood that the mails shall be carried in accordance with the terms, conditions and responsibilities prescribed by the Laws governing the operation of the Postal Service, title 39 of the Code of Federal Regulations and postal conventions now in effect.

Each vehicle used to transport mails between post offices and vessels, except the completely closed van type, the mail compartment of which must be locked or sealed, shall be provided with a man to ride on the rear and protect the mail. When a rack type truck is used the sacks shall be covered by a tarpaulin.

13. To carry the mails from the post offices to the piers at New York and New Orleans, plaintiff entered into contracts with trucking companies under which plaintiff paid for the trucking at a minimum rate per bag on week days and at a higher rate per bag for overtime periods, weekends and holidays. The names of the truckmen authorized to receive the mails were furnished to the post offices.

14. The mails for dispatch on a particular steamer were tendered the trucking contractor at the post office platform by post office employees who gave to the truckman a preliminary count of the number of sacks loaded with no indication of whether the sacks contained letters, prints or empty sacks. With the last truckload, the post office

furnished Form 2988A, entitled "Waybill of Sacks Dispatched", and Form 2988B entitled "Waybill of Diplomatic Dispatch Pouches". Form 2988A listed registered sacks according to country of origin and port of destination; however, only the count of sacks of (1) letters and prints, (2) parcel post, and (3) motion picture films, was shown, without reference to origin. Diplomatic pouches were listed according to origin and destination. A revision of Form 2988A in September 1953 provided space for listing as part of the "mail" advised on the waybill the number of sacks containing empty mail sacks.

15. As required by regulations, the mails were given special care for their protection while being trucked to the pier. They were the last item placed on board the vessel on departing and first off on arrival. On board the vessel, as a security measure, the mails were placed in locked compartments, containers or enclosures.

16. In connection with the weighing of the mails prior to dispatch, the Manual of Information for Exchange Offices stated as follows with regard to letter and print mails:

* * * * * * * * *

Bagging, Sealing, Weighing and Recording

* * * * * * * * *

Payment for the conveyance of mails by steamers to other countries is based on the *net weight* of the mails (rate for letters is more than that for prints). Therefore, in weighing the sacks, the *net weight* is recorded.

* * * * * * * * *

With regard to registered mails, the Manual stated:

* * * * * * * * *

In closing out a dispatch or when a sack is made up at any other time, the articles to be enclosed are weighed before being placed in the sack and the net weight (letters and prints separately) is recorded.

* * * * * * * * *

With regard to parcel post mails, the Manual stated:

. . . . . .

Bulk billed parcels:—Ordinary parcel post packages which are to be advised simply in bulk on the parcel post bill (Form 2974) are placed directly in a sack after separation to the proper exchange office in the country of destination. As each sack is made up, it is entered on the bagging sheet separately, showing the sack number in consecutive order (commencing with No. 1 for each dispatch), the number of parcels of each weight unit in the sack (if required by the country of destination), and the net weight of the parcels.

. . . . . .

Large Volume:—

. . . . . .

In following this method the parcels for each exchange office are separated by weight unit groups and each group is bagged separately so that all the parcels in a sack will be of the same weight unit group, and it is to be understood that only sacks containing parcels of one weight unit group are to be entered on a single line as the records must show the weight unit of the parcels contained in any sack in case of future inquiry.

. . . . . .

With regard to foreign closed transit mails, the Manual stated:

. . . . . .

Weights:—A record is made of the origin and destination of each foreign closed transit mail dispatched by each steamer, registered and ordinary mails separately. The net weights of the sacks as endorsed on the labels are recorded by countries of origin and destination according to three classifications, letters, prints and parcel post. The weights are totaled according to the requirements of the reports submitted on Forms 2963, 2963(c) and 2963(d).

. . . . . .

In connection with the preparation of weekly weight reports, the Manual stated:

. . . . . .

Reports of the Weight of Mails Dispatched by Steamer, Forms 2963, 2963(e), 2963(d)

Net weights:—The net weight of the mails is the basis upon which payment is made for the transportation of mails on steamships of both United States and foreign registry.

. . . . . .

With regard to the return of empty sacks, the Manual stated:

. . . . . .

Bundles enclosed in sacks of prints:—Bundles of empty sacks not numerous enough to form a full sack are tied out with green labels and inserted in a sack of prints for the exchange office to which the sacks are being returned. The weight of the enclosed empty sacks is not included in the net weight of the outside sack.

. . . . . .

Weights:—The weights of sacks of empty equipment are not ascertained nor recorded as no compensation is paid for transportation of such sacks by steamships.

17. Prior to their dispatch, the mails are weighed in a post office workroom from which the general public is excluded. Letter mails were enclosed in sacks and weighed on scales which were preset for the tare weights of sacks used, and the indicated net weight of the mails enclosed was recorded for compensation purposes. Print mails are similarly weighed on a platform scale, a deduction being made for the weight of the enclosing sack, and the net weights thereof recorded. The sacks of parcel post mail were not weighed. Before being placed in sacks, the parcels were grouped according to the weights as recorded for postage purposes. However, these actual weights were not the weights recorded on forms sent to the steamship com-

panies; instead, the post office recorded an estimated average weight of the parcels, before being placed in sacks. With respect to the foreign closed transit mails, only the net weights of the letters, prints and parcel post mails were recorded. The sacks enclosing empty mail sacks transported by plaintiff were bundled in the same workroom as other domestic mails and were not weighed nor was any record of their weight maintained by the post offices.

18. Approximately a week or ten days after sailing the Post Office Department furnished plaintiff with a statement on Form 2963 of the weights of mails dispatched showing the weights of letters, prints and parcel post of United States origin and, separately, the weights of letters, prints and parcel post of foreign closed transit mails according to port of destination. The weight statements did not indicate whether the weights shown were net or gross weights. The weight statements did not show the number of bags and the weights shown could not be identified with the sacks as listed on the post office waybills.

19. Plaintiff company and the Post Office Department have had a long-standing controversy concerning the computation of mail pay for the carriage of ocean mail as relates to three of the elements of the total transportation. These elements or issues are measuring and computing payment on the basis of net as against gross weight; the return of empty sacks; and, cartage between the Post Office and the steamship dock.

On June 16, 1950, the plaintiff by its vice president sent a letter to the Assistant Postmaster General, which reads as follows:

> Over a long period of time this Company has repeatedly protested, verbally and in writing, against the refusal of the Department to allow any compensation for the weight of empty sacks tendered for transportation on ships operated by this Company under the American flag from ports in the United States to foreign ports.

We have also protested the refusal to include the weights of mail sacks in the weights of mails tendered by the United States for transportation to foreign countries.

It is our view that the gross weights of all mails (including sack containers) and empty sacks tendered by U.S. postmasters for outbound transportation is an obligation of your administration and compensation should be allowed and paid at the applicable rates for mail matter of the respective classifications.

The exclusion of the weights of sacks containing mail has no counterpart in any other system of transportation utilized by the Post Office Department. Furthermore, there is no precedent in commercial practice for exclusion of weights of containers. The practice of the Department has now become more aggravated by present requirements that air mail sacks, i.e., sacks carried outbound by air, be returned empty to the United States by steamer.

The Company has long regarded refusal to pay compensation for transportation of mail sacks as being unjust and regrets that it is forced to serve notice that on and after October 1, 1950, any mails that may be tendered the United Fruit Company by the United States postal authorities for transportation on United States registry vessels operated by this Company will be accepted and transported by this Company on the condition that the compensation for the transportation of the mails tendered will be computed upon the gross weight (including sacks) of the mails so tendered and transported.

Any empty mail sacks that may be tendered the United Fruit Company by the United States postal authorities for transportation on United States registry vessels operated by this Company will be accepted and transported with the distinct understanding that compensation will be claimed and demanded at the rates specified in the Postal Laws and Regulations for all other articles.

The foregoing will apply to all so-called Convention mails, for which your administration is obligated to

transport under the free transit provisions of the Convention of the Americas and Spain.

We wish to assure the Department of our sincere desire to continue to transport all mails tendered and in no sense is the letter to be construed as a refusal to transport any and all mails at the rates fixed by the Postmaster General, and the United Fruit Company recognizes in this regard its obligation under the Postal Laws and Regulations, but it respectfully disavows any obligation to transport sacks containing mail or empty sacks without compensation.

20. On July 14, 1950, the Acting Assistant Postmaster General, Bureau of Transportation, wrote plaintiff in part as follows:

In this connection your attention is called to the following Sections of the 1948 Postal Laws and Regulations:

Section 120.7, paragraph 3(b). *Definite rates.* Unless otherwise specially provided, payment shall be made for the transportation of United States mails and foreign closed transit mails on steamships of both United States registry and foreign registry, and for the transportation to the United States of mails which the United States is obligated to convey, at the rates of 8.8 cents a pound for mails consisting of letters and postcards and 1.1 cents a pound for mails consisting of other articles, including parcel post, for distances up to and including 300 nautical miles; 23.7 cents a pound for mails consisting of letters and postcards and 2.9 cents a pound for mails consisting of other articles, including parcel post, for distances from 300 up to and including 1,500 nautical miles, and 35.5 cents a pound for mails consisting of letters and postcards and 4.7 cents a pound for mails consisting of other articles, including parcel post, for distances exceeding 1,500 nautical miles.

Section 125.3. *Duty of vessels to carry mail tendered.* Except as otherwise provided by treaty or convention *the Postmaster General may require the transportation by any steamships of mail between the United States and any foreign port at the compensa-*

tion fixed under authority of law. Upon refusal by the master or the commander of such steamship or vessel to accept the mail, when tendered by the Postmaster General or his representative, the collector or other officer of the port empowered to grant clearance, on notice of the refusal aforesaid, shall withhold clearance until the collector or other officer of the port is informed by the Postmaster General or his representative that the master or commander of the steamship or vessel has accepted the mail or that conveyance by his steamship or vessel is no longer required by the Postmaster General. (62 Stat. 784; 18 U.S.C. 1724.) (Italics supplied by the writer.)

The Postmaster General has the lawful authority to set the rates of compensation for the transportation of United States mails on steamers sailing to foreign destinations.

With very few exceptions, to our knowledge, it is the universal practice not to pay for the weight of sacks used in connection with the dispatch of regular or parcel post mails or for the return of empty sacks, either in transit through foreign countries or by steamers. Compensation is paid on the net weight of the mail involved. This practice has been followed for a great number of years and is apparently based on the following provisions of the Universal Postal Union Convention, the present one being that of Paris of July 5, 1947:

Article 153, paragraph 7. In regard to sacks which contain nothing but empty sacks, or correspondence exempt from all transit charges (Article 68 of the Convention), the note Statistique is followed by the word Exempt.

Article 161, paragraph 5. *Transit charge account. In order to take account of the weight of the sacks and packing,* as well as of the classes of correspondence exempt from all transit charges in accordance with the provisions of Article 68 of the Convention, the total amount of the account for closed mails is reduced by 10 percent. (Italics supplied by the writer.)

It will be noted from the quoted Sections of the Universal Postal Union Convention that the weights of

empty sacks are not taken into consideration as regards statistics and transit charge accounts. This necessitates our charging other postal administrations for the net-weights of any foreign closed transit mails handled by the United States and vice versa.

A meeting of the Technical Transit Committee of the Universal Postal Union was held in Interlaken, Switzerland, during June of 1949, for the purpose of revising the Convention and regulations covering the handling and charges involved in connection with foreign closed transit mails. At that meeting the weight of sacks, as well as the return of empty sacks, was an important item on the agenda.

Owing to the complexities of the overall problem and the different viewpoints of various administrations, final decision was not arrived at during the Interlaken meeting. However, the matter has been and is receiving the attention of the various postal administrations and another meeting of the Technical Transit Committee is scheduled to take place in Switzerland during May or June of 1951, at which time the Committee will make definite recommendations for consideration at the next Congress of the Universal Postal Union to be held in Brussels, Belgium, in 1952.

We are sympathetic towards your problem and agree it is necessary that some action be taken towards adopting a universally uniform system as regards possible payment for the weight of sacks used in connection with the dispatch of mails as well as for the return of empty equipment. However, until such time as a change in procedure might be adopted by the Universal Postal Union, we regret it will be necessary for you to accept any mails tendered to steamers of the United Fruit Company by the United States postal authorities in accordance with the rules and regulations as set forth by the Postmaster General.

The emphasis by italic in § 125.3 and Article 161 appears in the Department's letter by underscoring.

The Post Office has always paid for all elements of ocean mail transportation on a basis computed on a net rather than a gross weight.

21. The plaintiff sent a further letter to the Assistant Postmaster General on September 29, 1950 in which it persisted in its earlier position and requested that it be furnished with information as to the weight of sacks carried, as follows:

. . . . . .

> Neither the weights of sacks containing mails nor the weights of empty sacks, are furnished by postmasters. Therefore, it is respectfully requested that the postmasters tendering mails to our vessels be directed to furnish statements of weights of sacks at the time net weight statements of mails are furnished. It is requested that the postmasters report (a) weights of sacks containing letter mails; (b) weights of sacks containing all other mails; (c) weights of sacks containing parcel post; and (d) weights of empty sacks.

22. On and after October 1, 1950, the Post Office Department continued to tender mails to plaintiff, and the United States postal authorities in the Canal Zone and postal administrations in the Caribbean area began to furnish plaintiff with the gross weights of mails dispatched on plaintiff's vessels. Plaintiff filed public vouchers with the Post Office Department for compensation on the basis of the gross weights furnished. These claims were disallowed and the Post Office Department revised the vouchers and made payment on the basis of the net weights of the mails transported.

23. On November 14, 1950, the Director of Posts, Balboa Heights, Canal Zone, wrote plaintiff in part as follows:

> The question of furnishing the weight of equipment containing mail was referred to Mr. John M. Redding, Assistant Postmaster General to whom you refer in your letter, and I am enclosing a copy of his reply.
>
> In view of his statement that no instructions have been issued to exchange offices dispatching mails to furnish such weights and that the matter is under study, it will be necessary for us to discontinue showing the weights of equipment on our waybills, as stated

in my reply to you under date of October 31, 1950, until such time as a change in policy is made by the Post Office Department in Washington.

The letter of Assistant Postmaster General Redding to the Director of Posts, dated November 9, 1950, reads in part as follows:

> I have not talked to anyone from the United Fruit Company about this subject as alleged in the letter to you and no instructions to furnish such weights have been issued by my office to the exchange offices dispatching the mails.
>
> The matter of pay for the transportation of the equipment[1] is being considered and if decision is reached making a change in our present policy you will be informed accordingly.

24. On May 14, 1951, the Assistant Postmaster General, Bureau of Transportation, wrote to plaintiff's Washington attorney as follows:

> I refer to your letter of October 3, 1950, and your visit here on Friday, May 11, 1951, relative to compensation for transportation of mail sacks tendered by postmasters of the United States for carriage on American flag steamers.
>
> The matter of handling and possible payment for empty mail sacks is on the agenda for discussion at the Technical Transit Committee of the Universal Postal Union to be held in Pontresina, Switzerland next month. Upon the return of our delegation from this meeting, I feel certain that we will be in a position to give you some definite advice on the subject.

25. The territorial and maritime transit rates in the 1947 Paris Convention (Article 67) were the basis of charges on the gross weights of letters and post cards and other articles (not including parcel post) exchanged in closed mails between two postal administrations for the benefit of

[1] This means mail bags.

the country whose services participate in the conveyance by means of the services of one or more other postal administrations.

A Technical Transit Committee was set up by the Universal Postal Union in 1939 to study and report on Universal Postal Union rates. Lapsing during the war, the Technical Transit Committee began meeting in 1949 and from 1950 on. The Technical Committee's findings on rates were submitted to the Brussels Congress in 1952. The proposal that there should be one rate for all mail was adopted; but, the proposals that gross weight replace net weight as the basis of compensation for carriage and the empty sacks be counted as mail were rejected by the member nations. The Brussels Convention became effective on July 1, 1953.

26. The Postal Regulations were amended effective August 1, 1954, removing the requirement that steamship companies truck incoming mails from the vessel to the post office, but leaving intact the requirement that outgoing mails be trucked from post office to pier; and establishing new rates of payment for the transportation of United States mails and foreign closed mails on steamships of United States and foreign registry.

On July 23, 1954, the plaintiff by its vice-president had sent a letter to the Assistant Postmaster General reiterating its previous protest of June 16, 1950, and, in addition, served notice that on and after August 1, 1954, plaintiff would demand reimbursement for expenses in trucking the mails from the post offices to the piers.

27. By a letter dated July 16, 1954, from the American Merchant Marine Institute to the Assistant Postmaster General that group confirmed:

> We further understand that we are still free to discuss with you amendments to the regulations which would effectuate our contention that compensation to the carriers should be calculated on gross weight of the mails, incoming sacks containing empty sacks, and

that reimbursement should be made to ocean carriers for the cost of trucking outbound mails from Post Office to ship side.

In closing, we strongly recommend and request that these new rates, with exceptions aforementioned, be made effective July 1, 1954.

To this letter the Assistant Postmaster General replied on June 30, 1954:

Your statements of understanding have been noted and I believe it advisable to state the Post Office Department's position with respect to the applicability of the new rates on some of these points, all of which were discussed in conferences with your representatives prior to the adoption of the proposed rates. The new rates will be applicable on the net weights of the mails, and cover compensation to the carriers for the return of sacks containing empty equipment as well as the transportation of outgoing mails from the post offices to the piers. I am sure we are in agreement as to the understanding of the industry with respect to these three points but your confirmation would be appreciated.

This position of the Post Office was furnished to plaintiff which by a letter signed by Vice-President Sam Baggett, dated July 23, 1954, to the defendant stated:

In connection with these amendments, we have been furnished with a copy of a letter dated June 30, 1954, addressed by you to Mr. Francis T. Greene, Executive Vice President, American Merchant Marine Institute (this Company being a member of the Institute) which contains the following paragraph:

> "* * * The new rates will be applicable on the net weights of the mails, and cover compensation to the carriers for the return of sacks containing empty equipment as well as the transportation of outgoing mails from the post offices to the piers. I am sure we are in agreement as to the understanding of the industry with respect to these three points but your confirmation would be appreciated.

The application of the new rates to the "net weights" of the mails will result in a substantial reduction in mail compensation to this Company, and on the basis of data submitted by representatives of this Company to representatives of the Department in conferences in recent months, the composite rates are not fair and reasonable.

* * * * * * * * *

Accordingly, you are hereby advised that on and after August 1, 1954, any mails that may be tendered pursuant to the Postal Laws and Regulations to the United Fruit Company for transportation on U.S. registered vessels operated by this Company will be accepted and transported on condition that compensation calculated on the basis of such rates will be accepted by the Company as compensation in part, and not as full compensation, for services rendered, and that therefore this Company reserves its right to demand payment of full compensation for such services.

The Company recognizes its obligation under the law to transport the mails, and we assure the officials of the Department of our sincere desire to continue to handle and transport all mails tendered, and in no sense is this letter to be construed as a refusal to provide and perform such services according to law, and in the manner, under the conditions, and with the services as prescribed by the Postmaster General.

28. The Department's practice of paying for the transportation of the mails on net weights is a long existing one, and apparently arose under R.S. § 4009 which provided that for transporting the mail between the United States and any foreign port the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship, any sum not exceeding the sea postage, on the mails so transported. This section, printed as § 1405, Postal Laws and Regulations, 1924, was followed by a note reading as follows:

Note. In view of the provisions of the Universal Postal Union Convention the term "sea postage" has

no meaning. United States steamships receive not exceeding the whole of the postage collected on the articles contained in the mails conveyed by said vessels; and foreign vessels are paid any sum not exceeding the rate of postage fixed for a single maritime transit by the Universal Postal Union Convention in force at such time.

The Act of July 3, 1926, entitled "An Act to Amend Section 4009 of the Revised Statutes," provided that for transportation of the mails the Postmaster General may allow a vessel of the United States compensation not in excess of the amount of postage collected on the mail transported on such vessel, and in case of a foreign vessel compensation not in excess of the sea transit rates prescribed by the Universal Postal Union Convention. The Act of February 14, 1929, entitled "An Act to prescribe more definitely the rates for compensation payable to steamships of United States registry for transportation of foreign mails," amended the Act of July 3, 1926, so as to provide that the Postmaster General may allow to United States vessels compensation on a weight basis of not exceeding 80 cents a pound for letters and 8 cents a pound for other articles, including parcel post. 39 U.S.C. § 654a).

29. The rates paid by the Department to the railroads for the territorial transit of the mails are fixed by the Interstate Commerce Commission and provide for compensation on a space, rather than weight, basis including the space occupied by sacks enclosing other mail matter and space occupied by empty mail sacks. Similarly, the Department compensates the airlines for the total weight of the mails carried, making no deduction for the weight of the bags containing mail.

30. On January 20, 1956, plaintiff submitted to the Post Office Department public vouchers for compensation for the transportation of sacks enclosing the mails and empty mail sacks during the period October 1, 1950 through July

31, 1954. By letter dated October 12, 1956, the vouchers were returned unpaid by the Post Office Department.

31. On October 31, 1957, and March 6 and March 24, 1959, plaintiff submitted to the Post Office Department public vouchers (1) for compensation for the ocean transportation of sacks enclosing the mails and of empty mail sacks and (2) for reimbursement for trucking the mails from the post offices to the piers, during the period August 1, 1954, through December 31, 1958. The claim for reimbursement for the cost of trucking was based on the cost to plaintiff per bag under its cartage contracts, plus administrative expense of three percent. By letters dated January 6, 1958, and March 13 and 25, 1959, the Post Office Department denied plaintiff's claims.

32. No compensation was allowed or paid based on the weight of the mail including the sacks enclosing the letters, etc., or for the weights of empty mail sacks. The parties have stipulated the weights of sacks enclosing the mails and the weights of empty sacks transported by plaintiff and the amounts due in the event it is found that plaintiff should recover, either completely or in part. The amount due for weights of sacks enclosing the mails is calculated at rates fixed and paid by the Postmaster General for the weight of the mails enclosed in such sacks. The amount due for the empty sacks transported during the period October 1, 1950, through July 31, 1954, is calculated at rates fixed and paid by the Postmaster General for "all other articles" of mail matter, and for the period August 1, 1954, through December 31, 1958, when a single rate was applicable to all categories of mails, at the same rate fixed and paid for other mails dispatched and transported on plaintiff's vessels.

United Fruit has at all times maintained an active, live rate tariff for the carriage of a cargo commodity designated as "mail bags, canvas bags." The Post Office Department has in the past dispatched hundreds of shipments of empty mail bags by ocean carriers under bills of lading as

cargo under tariff rates; whenever it would be cheaper to do so.

33. No additional compensation was allowed for the trucking or cartage of mails from post offices to piers in the payments for the transportation of mails on a net weight basis after August 1, 1954, and the parties have stipulated the amounts due for such trucking at the cost to plaintiff per bag under the contracts between plaintiff and its trucking contractors at New York and New Orleans, plus 3 percent additional to cover administrative costs.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover and judgment will be entered to that effect. The amount of recovery will be determined pursuant to Rule 38(c).

Proceedings following opinion of the court

On July 12, 1961, plaintiff filed a motion for rehearing.

On October 4, 1961, the court entered the following order on said motion:

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the Rules of this court and, on consideration thereof,

It Is Ordered this fourth day of October, 1961, that said motions be and the same are overruled as follows:

* * * * * * * * * *

460-56 & 568-57 United Fruit Company.
Plaintiff's motion.

* * * * * * * * * *

By the Court
/s/ Marvin Jones
Marvin Jones
Chief Judge

RELEVANT POSTAL LAWS AND REGULATIONS 1948 IN EFFECT ON AND AFTER OCTOBER 1, 1950 (PLAINTIFF'S EXHIBIT 18)

Sec. 1207. *Compensation for transportation of foreign mails*—

(a) *Limits of compensation; appropriation authorization.* . . . [F]or transportation of the mails (1) between the United States or its Territories or possessions and any foreign country, (2) between the United States and its possessions or its naval or military forces abroad, or (3) between any such possession or naval or military forces and any other such possession or naval or military forces, the Postmaster General may allow, in the case of a vessel of the United States, compensation not in excess of 80 cents a pound for letters and post cards and 8 cents a pound for other articles (including parcel post), and in the case of a foreign vessel, compensation not in excess of the sea transit rates prescribed from time to time by the Universal Postal Union Convention; . . . (R.S. 4009, as amended; 39 U.S.C. 654(a)).

(b) *Definite rates.* Unless otherwise specially provided, payment shall be made for the transportation of United States mails and foreign closed transit mails on steamships of both United States registry and foreign registry, and for the transportation to the United States of mails which the United States is obligated to convey, at the rates of 8.8 cents a pound for mails consisting of letters and post cards and 1.1 cents a pound for mails consisting of other articles, including parcel post, for distances up to and including 300 nautical miles; 23.7 cents a pound for mails consisting of letters and post cards and 2.9 cents a pound for mails consisting of other articles, including parcel post, for distances from 300 up to and including 1,500 nautical miles, and 35.5 cents a pound for mails consisting of letters and post cards and 4.7 cents a pound for mails consisting of other articles, including parcel post, for distances exceeding 1,500 nautical miles.

(c) *Exceptions to above rates.* As an exception to the rates specified in paragraph (b) of this section, payment for mails which the United States is obligated to convey shall be made at the rates specified in the schedule stated below in the following services:

(1) Onward from the Canal Zone covering mails dispatched from Canal Zone ports to any ports, except those in continental United States;

(2) From any port in the countries signatory to the conventions of the Postal Union of the Americas and Spain (except continental United States, Canada and Spain, and Havana, Cuba, for mails forwarded from continental United States for transshipment) to any other port (except ports in continental United States, Canada and Spain, and Havana, Cuba, for mails destined to the United States); also from ports in countries not signatory to the conventions of the Postal Union of the Americas and Spain, to any other port (except ports in continental United States, Canada and Spain, and Havana, Cuba, for mails destined to the United States), covering regular mails originating in signatory countries.

	Letters and post cards	Other articles, including parcel post where conveyance is obligated
	Cents per pound	Cents per pound
Up to 300 nautical miles	6.7	1.50
From 300 to 1,500 nautical miles	11.8	2.00
Over 1,500 nautical miles	20.0	3.00

Note: Effective August 1, 1954, Sections 120.7(b) and (c) were amended, as follows (F.R. Doc. 54-5110; Filed July 1, 1954):

Sec. 120.7(b) *Definite rates.* Unless otherwise specially provided, payment shall be made for the transportation of United States mails and foreign closed transit mails on

steamships of United States registry and foreign registry at the rates specified in the schedule indicated below:

Distance conveyed (nautical miles	United States mails, including parcel post, on steamships of United States registry (cents per pound—net weights)	All mails, including parcel post, on steamships of foreign registry; and foreign closed transit mails, including parcel post, on steamships of United States registry (cents per pound—net weights)
Up to 300 miles	3.1	1.8
Over 300 up to 600 miles	3.1	2.5
Over 600 up to 1,000 miles	3.1	3.1
Over 1,000 up to 1,500 miles	3.6	3.6
Over 1,500 up to 2,000 miles	4.7	4.0
Over 2,000 up to 2,500 miles	4.7	4.4
Over 2,500 up to 3,000 miles	4.7	4.7
Over 3,000 up to 3,500 miles	5.0	5.0
Over 3,500 up to 4,000 miles	5.3	5.3
Over 4,000 up to 5,000 miles	5.6	5.6
Over 5,000 up to 6,000 miles	6.1	6.1
Over 6,000 up to 7,000 miles	6.5	6.5
Over 7,000 up to 8,000 miles	6.8	6.8
Over 8,000 miles	7.1	7.1

Note: Section 120.7(b) was later redesignated as 39 C.F.R. 95.4(b).

Sec. 125.2 *Mails carried by foreign vessels—*

(a) *Must be deposited in post office.* All letters or other mailable matter conveyed to or from any part of the United States by any foreign vessel, . . . shall be delivered into the United States post office by the master or other person having charge or control of such vessel when arriving, and be taken from the United States post office when departing, . . . and for refusing or failing to do so, . . . the party offending shall be fined not more than one thousand dollars. (18 U.S.C. 1724, first paragraph) (*Note:* The foregoing

provision was repealed by the Act of September 25, 1951; 65 Stat. 336).

* * * * * * * * * *

Sec. 125.3 *Duty of vessels to carry mail tendered.* Except as otherwise provided by treaty or convention the Postmaster General may require the transportation by any steamships of mail between the United States and any foreign port at the compensation fixed under authority of law. Upon refusal by the master or the commander of such steamship or vessel to accept the mail, when tendered by the Postmaster General or his representative, the collector or other officer of the port empowered to grant clearance, on notice of the refusal aforesaid, shall withhold clearance until the collector or other officer of the port is informed by the Postmaster General or his representative that the master or commander of the steamship or vessel has accepted the mail or that conveyance by his steamship or vessel is no longer required by the Postmaster General. (Act of February 6, 1929; 18 U.S.C. 1724, second paragraph.)

Sec. 125.5a *Transportation and protection of mails between post office and ships* (as amended effective August 1, 1954).

(a) Steamship companies shall be responsible for the transportation and protection of all outgoing mails, including parcel post and sacks containing empty sacks, from the post office to the transporting vessel.

(b) All incoming mails, including letter mails, parcel post and sacks containing empty sacks, are to be placed on the piers and delivered into the custody of agents of the postal service by the steamship companies for trucking to the post office; Provided that mails shall be so placed and delivered before making entry or breaking bulk and such handling shall be regarded as compliance with paragraph

(a) of this section.[1] Mails, including letter mails, parcel post and sacks containing empty sacks, waybilled to ports other than the first port of call of vessel in the United States shall be discharged at the first port of call if the vessel is scheduled to remain at said first port of call for more than 24 hours.

(c) Each vehicle used to transport mails between post offices and vessels, except the completely closed van type, the mail compartment of which must be locked or sealed, shall be provided with a man to ride on the rear and protect the mail. When a rack type truck is used the sacks shall be covered by a tarpaulin.

(d) The registered (red label) sacks shall be specially protected during transfer and on board vessels. The red label sacks shall be separately delivered to the steamship company's representative at the post office in the case of outgoing mails and the incoming red label sacks shall be segregated on the piers by the steamship companies.

Sec. 1255. *Fines on carriers transporting mails beyond borders of United States—*

(a) The Postmaster General may impose or remit fines on contractors or carriers transporting the mails by air or water on routes extending beyond the borders of the United States for any unreasonable or unnecessary delay to such mails and for other delinquencies in the transportation of the mails. (46 Stat. 1049; 39 U.S.A., 655).

(b) Steamship companies shall be answerable to the United States for the safety of the mail intrusted to them, and accountable for any loss or damage resulting to any of such mail by reason of failure on the part of any of their officers, agents or employees to exercise due care in the custody, handling or transportation thereof. In case of delinquencies, fines may be imposed or deductions made from the company's pay.

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[1] Paragraph (a) of Section 1254 is the Act of July 3, 1952 (66 Stat. 325) amending 18 USC 1699.

Provisions of the Universal Postal Union Conventions

Articles of the Universal Postal Union Conventions of Paris 1947 (State Department Treaties Series 1850) and Brussels 1952 (State Department Treaties Series 2800) relevant to limit of compensation in case of a foreign flag vessel pursuant to the Act of February 14, 1929; 39 U.S.C. 654(a), and provisions pertinent to the decision of the Court of Claims.

Paris 1947

ARTICLE 67

TRANSIT CHARGES

1. Articles of correspondence[1] exchanged in closed mails between two Administrations, by means of the services of one or more other Administrations (third services), are liable, for the benefit of each of the countries traversed or whose services participate in the conveyance, to the transit charges indicated in the following table:

	Per kilogram of letters and post cards Fr. c.	Per kilogram of other articles Fr. c.
1 Territorial transit:		
• • •		
2 Maritime transit:		
Up to 300 nautical miles	0.60	0.08
From 300 to 1,500 nautical miles	1.60	0.20
Between Europe and North America	2.40	0.32
From 1,500 to 6,000 nautical miles	4.80	0.60

[1] Articles of correspondence is defined by Article 35 as follows:

"The term *articles of correspondence* applies to letters, single and reply-paid post cards, commercial papers, prints, raised print for the blind, samples of merchandise, small packets, and *Phonopost* articles."

ARTICLE 68

Exemption from Transit Charges

The following are exempt from all territorial or maritime transit charges: The correspondence sent free of postage mentioned in Article 52; reply post cards returned to the country of origin; redirected articles; returned undeliverable articles; return receipts; money orders; and all other documents relating to the postal service, particularly correspondence relative to postal checks.[2]

[2] Article 52. Franking privilege, exempts from all postal charges correspondence exchanged between Postal Administrations, between these Administrations and the International Bureau, between post offices of the Union, and between those offices and the Administrations, as well as that for which the franking privilege is expressly provided; mail articles (except C.O.D.) addressed to prisoners of war; the same is true of correspondence concerning prisoners of war, as provided for in Article 79 of International Convention Prisoners of War, Geneva 1929.

Brussels 1952

ARTICLE 78

Transit Charges

1. With the exceptions prescribed by Article 79, closed mails exchanged between two Administrations or between two offices of the same country through the services of one or more other Administrations (third services), are subject, for the benefit of each of the countries traversed or whose services participate in the conveyance, to the transit charges indicated in the table below. Such charges are borne by the Administration of the country of origin of the dispatch.

Distances	Charges per gross kilogram Fr. c.
1. Territorial transit	
• • •	
2. Maritime transit:	
up to 300 nautical miles	— .12
from 300 up to 600 nautical miles	— .17
from 600 up to 1,000 nautical miles	.21
from 1,000 up to 1,500 nautical miles	— .24
from 1,500 up to 2,000 nautical miles	.27
from 2,000 up to 2,500 nautical miles	.30
from 2,500 up to 3,000 nautical miles	— .32
from 3,000 up to 3,500 nautical miles	.34
from 3,500 up to 4,000 nautical miles	— .36
from 4,000 up to 5,000 nautical miles	— .38
from 5,000 up to 6,000 nautical miles	.41
from 6,000 up to 7,000 nautical miles	— .44
from 7,000 up to 8,000 nautical miles	— .46
over 8,000 nautical miles	— .48

2. Barring agreement to the contrary, maritime conveyances effected directly between two countries by means of ships of one of them are considered as third services.

• • • • • • • • • • •

4. Maritime transit begins at the moment when the dispatches are put under hoist and ends when they have been unloaded at the wharf.

ARTICLE 79

Exemption from Transit Charges

The correspondence exempted from postage charges which is mentioned in Articles 36 to 38 is exempt from all territorial or maritime transit charges.[3]

Paris 1947

ARTICLE 153

Preparation and Designation of Closed Mails During the Statistical Period

1. During each statistical period, the exchange of correspondence in closed mails across the territory or by means of the services of one or more intermediate Administrations gives rise to the employment of separate sacks for *letters and post cards* and for *other articles*.

2. The number of sacks utilized for the preparation of a dispatch must be reduced to the strict minimum.

. . . . . .

6. During the statistical period all dispatches exchanged in transit shall bear, in addition to the ordinary labels, a special label bearing in large letters the note *Statistique* (statistics), followed by the indication *5 kilograms*, *15 kilograms*, or *30 kilograms*, according to the division of weight (Article 154, Section 1, hereafter). The statistical label shall also bear the note *L. C.* or *A. O.*, as the case may be.

7. In regard to sacks which contain nothing but empty sacks, or correspondence exempt from all transit charges (Article 68 of the Convention), the note *Statistique* is followed by the word *Exempt*.

. . . . . .

[3] The correspondence and other articles mentioned in Articles 36 and 37 of the Brussels Convention are the same as those exempt from all postage charges mentioned in Article 52 of the Paris Convention; Article 38 of the Brussels Convention also exempts raised print for the blind from all postal charges.

ARTICLE 154

Fixing the Number of Sacks and Weight of Closed Mails

1. For dispatches which give rise to the payment of transit charges, the dispatching exchange office makes use of a special letter bill conforming to Form C 15 hereto appended. It enters on that letter bill the number of sacks, dividing them, if occasion arises, into the following classes:

	Number of sacks whose gross weight		
Description of the sacks	does not exceed 5 kg. (light sacks)	exceeds 5 kg. but not 15 kg. (medium sacks)	exceeds 15 kg. but not 30 kg. (heavy sacks)
1	2	3	4
L. C.			
A. O.			
Number of sacks exempt from transit charges			

2. The number of sacks exempt from transit charges shall be the total of those bearing the indication *Statistique —Exempt* in accordance with the provisions of Article 153, Section 7.

• • •

ARTICLE 161

Transit-Charge Account

1. For the preparation of transit accounts, the light, medium or heavy sacks, as defined by Article 154, are considered in the accounts as having their average weights of 3, 12 or 24 kilograms respectively.

4. The duty of making up the accounts is incumbent upon the creditor Administration, which transmits them to the debtor Administration.

5. In order to take account of the weight of the sacks and packing, as well as of the classes of correspondence

exempt from all transit charges in accordance with the provisions of Article 68 of the Convention, the total amount of the account for closed mails is reduced by 10 percent.

Brussels 1952

Note: Provisions corresponding to the foregoing provisions of Articles 153, 154 and 161 of the Paris Convention are contained in Articles 171, 172 and 179 of the Brussels 1952 Convention with modifications brought about by the elimination in the Brussels Convention of the distinction between Letters and Other Articles in the territorial and maritime transit rates in Article 78 and in the statistics for settlement of accounts between Postal Administrations.

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No. 697

In the Supreme Court of the United States

OCTOBER TERM, 1931

UNITED FRUIT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ABRAM E. ITEL,
Solicitor General,
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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:	
United Fruit Co. v. *United States*, 144 C. Cls. 154	9
United States v. *Jones*, 336 U.S. 641	9
Statutes:	
Suits in Admiralty Act, 46 U.S.C. 741	8
18 U.S.C. 1724	3
28 U.S.C. 1491	5
39 U.S.C. 654(a)	2, 9
Miscellaneous:	
1924 Ann. Reports of the Postmaster General	4
1925 Ann. Reports of the Postmaster General	4
1931 Manual, Foreign Distribution Scheme of New York Post Office	4
1 Op. Assistant Attorney General for Post Office Department, 773 (1882)	4
2 Op. Assistant Attorney General for Post Office Department, 762 (1889)	4

630506—62

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims granting plaintiff's motion to strike defendant's third and fourth special defenses (Pet. App. 1a–5a) is reported at 114 C. Cls. 154. The opinion of the Court of Claims on the merits (Pet. App. 26a–34a) is reported at 288 F. 2d 489.

JURISDICTION

The judgment of the Court of Claims was entered on April 7, 1961. A timely petition for rehearing was denied on October 4, 1961. The time for filing a petition for a writ of certiorari was extended to February 1, 1962, by order of the Chief Justice. The petition for a writ of certiorari was filed on Febru-

ary 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the rates of compensation fixed by the Postmaster General for the transportation of the mails by steamship included payment for the elements of bag weight and cartage, as well as for carriage of the net contents.

STATUTE INVOLVED

Title 39 of the United States Code, Section 654(a), provides as follows:

> (a) Except as provided in subdivision (b) of this section, for transportation of the mails, (1) between the United States or its Territories or possessions and any foreign country, (2) between the United States and its possessions or its naval or military forces abroad, or (3) between any such possession or naval or military forces and any other such possession or naval or military forces, the Postmaster General may allow, in the case of a vessel of the United States, compensation not in excess of 80 cents a pound for letters and post cards and 8 cents a pound for other articles (including parcel post), and in the case of a foreign vessel, compensation not in excess of the sea transit rates prescribed from time to time by the Universal Postal Union Convention: *Provided*, That nothing herein shall limit the authority of the Postmaster General to enter into contracts for the transportation of mails under the provisions of the Merchant Marine Act of 1928 at the rates of compensation therein authorized.

STATEMENT

Petitioner is a steamship owner and operator of a steamship line in foreign commerce between New York and New Orleans and various ports in Central and South America, the Panama Canal Zone, and islands in the Caribbean area (Finding 2; Pet. App. 34a). For years, as required by law, it has transported domestic and transit mails tendered by the Postmasters at New York and New Orleans at the post office platforms for delivery to foreign ports[1] (Finding 9; Pet. App. 37a). Petitioner also transported mail sacks containing empty sacks being returned to the country of origin. Most of these empty sacks had originally contained mails sent by steamship to the United States or to a foreign country, and which were being returned to the country of origin through the United States postal service.[2]

On June 16, 1950, petitioner's vice-president sent a letter to the Assistant Postmaster General protesting against the refusal of the Department to allow any compensation for steamship transportation for the weight of empty sacks, and the refusal to include the weights of mail sacks in the weights of mails, and expressing the view that gross weights of all mails,

[1] At all times involved in these actions, the transportation of mails by ship from the United States was required by statute to be performed at rates fixed by the Postmaster General. 18 U.S.C. 1724 (Finding 5; Pet. App. 7a).

[2] Some of the empty sacks were air mail sacks which had contained mails flown into the United States and which were being returned by steamship. The Court of Claims ruled that petitioner is entitled to compensation for the carriage of these sacks (Pet. App. 27a, 33a–34a). The United States has not contested this liability.

including sack containers, as well as empty sacks tendered by United States postmasters were an obligation of the Department and that compensation should be allowed and paid at the applicable rates. It was also stated that empty sacks "will be accepted and transported with the distinct understanding that compensation will be claimed and demanded at the rates specified in the Postal Laws and Regulations for Other Articles" (Finding 19; Pet. App. 44a–46a).

On July 14, 1950, the Acting Assistant Postmaster General replied, *inter alia*, that with very few exceptions payment for the carriage of letters and other articles and the sacks in which they were contained, and for the return of the empty sacks, was universally based upon the weight of the letters and post cards and other articles, exclusive of the sacks (Finding 20; Pet. App. 46a–48a).[3]

On September 29, 1950, petitioner sent a further letter to the Assistant Postmaster General in which it persisted in its position and requested that it be furnished with information as to the weight of the sacks carried (Finding 21; Pet. App. 49a). Thereafter the Post Office Department continued to tender mails to petitioner and the United States postal au-

[3] This practice of paying compensation for the carriage of the letters and the sacks in which they were contained, based on the weight of the letters alone, was of long standing and is referred to in two published opinions of the Assistant Attorney General for the Post Office Department: 1 Op. Assistant Attorney General for Post Office, 773 (1882); 2 Op. Assistant Attorney General for Post Office, 762 (1889); see also the 1924 and 1925 Ann. Reports of the Postmaster General (Def. Ex. 23 and 24) and the 1931 Manual, Foreign Distribution Scheme of New York Post Office (Def. Ex. 19).

thorities in the Canal Zone and Caribbean area began to furnish petitioner with gross weights of mails dispatched on vessels. Petitioner filed public vouchers with the Post Office Department for compensation on the basis of the gross weights furnished. These claims were disallowed and the Post Office Department revised the vouchers and made payment on the basis of the net weights of the mails transported (Finding 22; Pet. App. 49a). Petitioner sent a further letter to the Assistant Postmaster General on July 23, 1954, reiterating its previous protests, and, in addition, serving notice that on and after August 1, 1954, it would demand reimbursement for expenses in trucking mails from the post offices to the piers (Finding 26; Pet. App. 51a).

Thereafter petitioner brought two suits in the Court of Claims under 28 U.S.C. 1491, to recover the balance of compensation allegedly due for weights of sacks containing mails, for empty sacks transported by steamship, and for reimbursement of expenses for trucking mails from the post offices to the steamship piers. The two suits were consolidated for hearing.

The Court of Claims held that the rate fixed by the Postmaster General for the carriage of mail covered all services incidental thereto and that petitioner was not entitled to additional compensation. The court observed that the practice of paying compensation for the carriage of letters and post cards and the sacks in which they were contained, based on the weight of the letters and post cards alone, was of long standing (Pet. App. 29a–39a), and that, if there had been any intention to pay additional compensa-

tion for the carriage of the sacks, the regulations would have so provided (Pet. App. 29a). Judgment was allowed only for empty air mail sacks enclosed in bundles of other empty sacks, the amount of recovery to be subsequently determined (see footnote 2, *supra*, p. 3). An application for rehearing was denied on October 4, 1961.

ARGUMENT

The Court of Claims was clearly correct in deciding that the rates of compensation fixed by the Postmaster General included payment for bag weight and cartage as well as for carriage of the net contents. Its decision is in accord with the old and established practice of the Post Office Department of paying compensation for the carriage of the mails based on the weight of the letters alone. Moreover, the issue is very narrow and, as presented, basically factual. There is no question of law for review by this Court.

1. To focus attention on what is offered for this Court's determination it should be pointed out that, even in petitioner's view, the core of the dispute is whether the decision below is predicated on erroneous findings of fact by the Trial Commissioner (Pet. 13, 16). The controverted question is whether the rates of compensation, as fixed by the Postmaster General, were intended to cover, and included payment for, bag weight and cartage, in addition to carriage of the net contents. In this connection, petitioner specifically challenges the court's finding that the "Post Office has always paid for all elements of ocean mail transportation on a basis computed on a net rather

than gross weight" (Pet. 13; Finding 9; Pet. App. 48a).

There is no reason, however, for this Court to scrutinize the Court of Claims' findings which show that the practice of paying compensation for the carriage of letters and post cards and the sacks in which they were contained, based on the weight of the letters and post cards alone, was both old and consistent. For a long time the course of action of the Post Office Department shows clearly that it intended the compensation fixed for the carriage of the letters and post cards to include the carriage of the things containing the letters and post cards (Findings 20, 28; Pet. App. 48a, 53a). See footnote 3, *supra*, p. 4.

Petitioner insists that the letter of July 14, 1950, from the Acting Postmaster General to petitioner (*supra*, p. 4) proves that no compensation was paid for sacks enclosing the mails, nor for empty sacks sent from the United States to foreign countries to which they belonged (Pet. 13). On the contrary, as the Court of Claims observed, this letter stated what the long-continued practice had been and that this practice would be continued until such time as a change in procedure might be adopted by the Universal Postal Union. Petitioner's protest was rejected and the Department's answer was equivalent to saying that the rates covered all the services required to transport the mails. Since the Postmaster General, as petitioner concedes, had the authority to fix the rates, this necessarily concluded the matter for the present suit which is necessarily based upon the rates actually fixed. See *infra*, p. 9.

2. Petitioner asserts that the decision in the instant case is in conflict with the Court of Claims' earlier decision in this case that, for jurisdictional purposes, the mail includes not only the letters themselves, but also the containers (Pet. 18).[4] If we understand petitioner's argument, it is that, since the sacks were held to be a part of the mails for the purposes of the jurisdiction of the Court of Claims over suits for the carriage of the mails, petitioner is automatically entitled to compensation based upon the weight of the mails including the sacks, and the weight of the empty sacks returned. The simple answer lies, of course, in the court's ultimate determination that the rates of compensation fixed by the Postmaster General, while computed on the net weight of the mail, did include payment for the elements of bag weight and cartage, as well as for carriage of the contents. Moreover, even if there were a conflict in principle between decisions of the same court, in the same case, this would not be a basis for certiorari since the later decision would be controlling.

3. Finally, petitioner insists that implicit in the Court of Claims' decision that the rates of compensation fixed by the Postmaster General included pay-

[4] The United States argued in the court below that the subject matter of petitioner's claim is the carriage by sea of property owned or possessed by the United States on merchant vessels owned or operated by petitioner and is therefore within the exclusive jurisdiction of the United States District Court under the Suits in Admiralty Act, 46 U.S.C. 741–749. The court rejected this argument (Pet. App. 1a–5a). In the event certiorari is granted, the United States reserves the right to reassert this defense.

ment for bag weight and cartage there lurks an important question of the interpretation of certain provisions of the Universal Postal Union Convention (Pet. 3, 4, 16, 19). The assertion is that the "decision supports the survival of the ancient practice of the Post Office Department in calculating compensation for steamship transportation pursuant to R.S. 4009, instead of on the basis of maritime transit rates (sea transit rates) authorized as a rate base * * * by the Act of, February 14, 1929, 39 U.S.C. 654(a)" (Pet. 16; see also Pet. 20–21). In this, petitioner is merely restating its argument that the traditional ocean mail system is wrong and that the accepted compensation scheme is unfair. But the rule is that the way in which the Postmaster General fixes the mail rate and the method of its measurement is not for the Court of Claims to decide in a suit such as this. *United Fruit Co.* v. *United States*, 144 C. Cls. 154, 158 (Pet. App. 5a); see also *United States* v. *Jones*, 336 U.S. 641. If petitioner believed that the rates were not fair and reasonable, or that they deprived petitioner of property, the remedy was to seek direct review of those rates. This was not done. Instead, petitioner now seeks to attack the rates collaterally in the present proceeding based upon those rates—which it cannot do.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER TERM, 1961

No. 697

UNITED FUEL COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

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STATEMENT

The Government's brief in opposition to the granting of a writ of certiorari oversimplifies and obscures the importance of the questions presented by petitioner in the following particulars:

(1) On page 2, limits its question presented to the single issue of law as to whether the rates of compensation fixed by the Postmaster General for transporta-

tion of the mails by steamship to foreign ports under Title 39, United States Code, Section 654(a) "included payment for the elements of bag weight and cartage, as well as for the carriage of the net contents." (Pet. App. 57a-58a.)

(2) In summarizing (pp. 3-4) petitioner's letter of June 16, 1950, to the Assistant Postmaster General (Finding 19, Pet. App. 16a, 44a-48a) omits the material and relevant fact that petitioner served notice that on and after October 1, 1950, mails tendered by United States postal authorities will be accepted and transported on condition that compensation for the transportation of the mails tendered will be computed upon the gross weights (including sacks) of mails so tendered and transported; also omits petitioner's statement that "the foregoing will apply to all so-called Convention mails, for which your administration is obligated to transport under the free transit provisions of the Convention of the Americas and Spain." (Finding 19; Pet. App. 44a-46a).

(3) The summarization (p. 4) of the Department's letter of July 14, 1950, in reply to petitioner's letter of June 16, 1950, conveys an incorrect impression as to what was contained in that letter. Petitioner sub-

[1] Article 3 of the Convention of the Americas and Spain signed at Rio de Janeiro September 25, 1946, effective January 1, 1947, provided that

> The gratuity of territorial, fluvial and maritime transit is absolute in the territory of the Postal Union of the Americas and Spain; consequently, the countries which form it obligate themselves to transport across their territories, and to convey by the ships of their registry or flag, without any charge whatsoever to the countries, all correspondence which the latter send to any destination. (Treaties and Other International Acts Series 1680, Dept. of State.)

mits that the two letters as set forth in Findings 19 and 20 should be read together. (Pet. App. 44a-48a).

(4) Finally, the Government argument minimizes (pp. 8-9) the importance of petitioner's questions presented (Pet. 3-4), involving the conflict in the interpretation of provisions of the Postal Union Conventions of Paris 1947 and Brussels 1952 by the Postmaster General and the Court of Claims of an undisclosed limitation on the rates per pound specified in Section 120.7(3)(b) of the Postal Regulations 1948. (Pet. App. 28a, 57a).

PETITIONER'S REPLY

Petitioner again asserts that the Department's letter of July 14, 1950 (Finding 20, Pet. App. 16a, 46a) attempted to justify its practice not to pay compensation for sacks enclosing the mails or for the empty sacks by Articles 153 and 161 of the Paris Convention, which govern settlement of accounts between countries for territorial and maritime transit performed by one country for another; the practice was not based

[1] After the controversy arose growing out of Petitioner's letter of June 16, 1950 and the Department's reply of July 14, 1950 (Pet. App. 16a-19a) and subsequent to the Brussels Convention, self serving declarations were made as to intention of the rates to be promulgated following the Brussels Convention of 1952 (See Court of Claims Finding 27, Pet. App. 51a-53a) which was substituted for the Commissioner's Finding 27 (Pet. App. 22a). In its motion for rehearing, petitioner excepted to the Court's Finding 27 on the ground that petitioner's position with respect to the new rates was not wholly presented. The Court's attention was invited to Petitioner's requested findings submitted to the Commissioner and urged the Court to amend its Finding 27 by including four other letters on the subject in their entirety, viz. Gov't. Exhibits 14A, 14B and 14C. (Motion for Rehearing and Brief, pp. 18-19).

on any undisclosed intention that the rates fixed in Section 120.7(3)(b) (Pet. App. 28a, 57a) included compensation for the sacks or cartage from post offices to piers.

Articles 153 and 161 of the Paris Convention, do not apply to any mails *except foreign closed transit mails, i.e.*, letters and print mails, which are subject to transit charges. This excludes parcel post and any mails not subject to transit charges for the benefit of the transporting country. Yet it was these provisions of limited application which the United States Post Office Department relied upon in its letter of July 14, 1950, justifying its practice with respect to all mails to deduct the weights of sacks, including sacks containing parcel post and weights of all empty sacks including empty parcel post sacks. (Witness Greever Allan, Tr. 411-415).

The Government's reply in opposition to the writ of certiorari, completely misses the point of petitioner's basis for requesting the writ when it says (p. 9) that "petitioner is merely restating its argument that the traditional ocean mail system is wrong and that the accepted compensation scheme is unfair. But . . . the method of its measurement is not for the Court of Claims to decide in a suit such as this," and in addition to citing the case of *United Fruit Co.* v. *United States*, 144 Ct. Cls. 154, 158 (Pet. App. 1a-5a) calls attention to the case of *United States* v. *Jones*, 336 U.S. 641. The Government urged this case in the court below as a bar to the court's jurisdiction. Petitioner pointed out to the Court of Claims that the award of compensation in the cases at bar does not require that court to raise, increase, or consider the highly complicated factors which determine whether a given rate is reason-

able or not, as was involved in the *Jones* case; also that in the cases at bar empty mail sacks were dispatched as mail, that the mails were in bags sealed by the post office against inspection and that the rates fixed by the Postmaster General should be paid on the total weights of that tendered as mail matter.

At the risk of repetition, petitioner emphasizes that the ancient or traditional system was, and still is, rooted to R.S. 4009, which authorized compensation on the basis of postage affixed to mail transported. This ancient basis took no note of weights of mail or weights of sacks—only of the postage affixed. The *postage basis of compensation* authorized in R.S. 4009 was changed by the Acts of July 3, 1926 and February 14, 1929, (39 USC § 654(a)) to a *rate base of compensation for weights* of mail transported.[3] Also, the Act of February 6, 1929, made it compulsory for any steamship to transport mails tendered by the Postmaster General (18 USC § 1724; Pet. App. 60a) and the Department's letter of July 14, 1950, to petitioner served notice on petitioner that for refusal to accept mails tendered, clearance of its vessels may be withheld until the mails are accepted or the clearance officer is advised by the Postmaster General that the mails have been accepted or their transportation is no longer required. Petitioner being thus compelled to accept

[3] The Government's reply in footnote on page 4 cites as authority for the ancient practice inter-office opinions of the law officers of the Department, viz., the Assistant Attorney General for the Post Office Department, rendered in 1882 and 1889. All citations in the footnote were prior to the amendments of R.S. 4009 by the Act of February 14, 1929 (39 USC 654(a)). The reference to Def. Exhibit 19, Manual Foreign Distribution Scheme of the New York Post Office only gave tare weights of sacks—nothing as to basis of compensation.

the mail tendered submits that it is entitled to compensation as claimed.

CONCLUSION

The Court is again urged to grant the petition for a writ of certiorari to the Court of Claims.

Respectfully submitted,

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